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THE CALCULUS OF ACCOMMODATION: CONTRACEPTION, ABORTION, SAME-SEX MARRIAGE, AND OTHER CLASHES BETWEEN RELIGION AND THE STATE

ROBIN FRETWELL WILSON*

Abstract: This Article considers a burning issue in society today—whether, and under what circumstances, religious groups and individuals should be exempted from the dictates of civil law. The “political maelstrom” over the Obama administration’s sterilization and contraceptive coverage mandate is just one of many clashes between religion and the state. Religious groups and individuals have also sought religious exemptions to the duty to assist with abortions or facilitate same-sex marriages. In all these contexts, religious objectors claim a special right of entitlement to follow their religious tenets, in the face of equally compelling claims that religious accommodations threaten access and may impose significant costs on others. Legislators and other policymakers have struggled with how to advance two compelling, and at times conflicting, values—access and religious liberty. This Article examines, and responds to, a number of “sticking points” voiced by legislators about a qualified exemption for religious objectors that would permit them to step aside from facilitating same-sex marriages so long as no hardship will result. These concerns bear an uncanny resemblance to reasons why some believe the Obama administration should not yield further on the coverage mandate. This Article maintains that religious accommodations qualified by hardship to others can transform what could be a zero-sum proposition into one in which access and religious freedom can both be affirmed.

* © 2012, Robin Fretwell Wilson, Class of 1958 Law Alumni Professor of Law, Washington and Lee University School of Law. I benefited immensely from presentations of an early version of this Article to workshops and panel discussions at the Brookings Institution; the Competing Claims of Law and Religion conference at Pepperdine University; the Georgetown University Law Center; the New York City Bar Forum on Reconciling Rights: Balancing Lesbian, Gay, Bisexual, and Transgender Civil Rights with First Amendment Religious Protection; Oxford University’s Magdalen College; Princeton University; Southern Methodist University; the University of Houston; the University of Illinois; the University of Oklahoma; and Washington and Lee University School of Law’s Faculty Enclave. I am especially indebted to Tom Berg, Bill Eskridge, Josh Fairfield, David Gamage, Nicole Huberfeld, David Hyman, Rick Garnett, Kent Greenawalt, Tim Jost, Anthony Kreis, Doug Laycock, Chip Lupu, Tim MacDonnell, Pamela Melton, Kathy Moore, and Stacey Tovino for insightful, helpful comments on early versions of this Article, and to John Eller, Ron Fuller, and Claire Hagan for their expert, diligent research support.

INTRODUCTION

2012 has witnessed a “political maelstrom”¹ over the Obama administration’s regulations to implement the new health care reform law, the Patient Protection and Affordable Care Act of 2010 (ACA).² These regulations require nearly all employers and health insurers to cover sterilization procedures and contraceptives,³ including newer emergency contraceptives like ella⁴ which sometimes act after fertilization to prevent pregnancy.⁵ Even before the regulations become final, a hue and cry arose from the faith community because mandated coverage places the bulk of religious employers “in the untenable position of having to choose between violating the law and violating their conscience[s]”⁶—specifically, their religious belief that life begins at con-

¹ See Timothy Stoltzfus Jost, *Analysis of the Obama Administration’s Updated Contraception Rule*, WASH. & LEE U., <http://law.wlu.edu/faculty/facultydocuments/jost/contraception.pdf> (last visited Sept. 17, 2012).

² Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. This Article refers to these laws collectively as the “ACA,” which is becoming the preferred term in contemporary literature. See, e.g., Timothy Stoltzfus Jost, *Loopholes in the Affordable Care Act: Regulatory Gaps and Border Crossing Techniques and How to Address Them*, 5 ST. LOUIS U. J. HEALTH L. & POL’Y 27, 27 (2011).

On June 28, 2012, the U.S. Supreme Court, in *National Federation of Independent Business v. Sebelius*, upheld the ACA’s individual mandate as a constitutional exercise of Congress’s taxing power, while striking down a portion of the ACA’s Medicaid expansion as exceeding Congress’s authority under the Spending Clause. 132 S. Ct. 2566, 2608 (2012).

³ Coverage of Preventive Services Under the ACA, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 29 C.F.R. pt. 54).

⁴ Section 2713 of the Public Health Services Act, enacted through the ACA, requires insurers to cover women’s “preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration.” Public Health Services Act, § 2713(a)(4), 42 U.S.C. § 300gg-13(a)(4) (2006 & Supp. IV 2011). These measures include “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity.” *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, HEALTH RESOURCES & SERVICES ADMIN., <http://www.hrsa.gov/womensguidelines> (last visited Sept. 17, 2012) [hereinafter *HRSA Coverage Guidelines*]; see News Release, Dep’t of Health & Human Servs., Statement of Sec’y Kathleen Sebelius (Jan. 20, 2012), available at <http://www.hhs.gov/news/press/2012pres/01/20120120a.html>; see also Coverage of Preventive Services Under the ACA, 77 Fed. Reg. at 8728 (discussing coverage of contraceptive services by insurers and health plans under the ACA); Jost, *supra* note 1, at 1 (analyzing the coverage mandate guidelines).

⁵ See *infra* notes 137–156 (discussing the mechanisms of action for ella and Plan B).

⁶ See Matthew Larotonda, *Catholic Churches Distribute Letter Opposing Obama Healthcare Rule*, ABC NEWS (Jan. 29, 2012, 8:19 PM), <http://abcnews.go.com/blogs/politics/2012/01/catholic-churches-distribute-letter-opposing-obama-healthcare-rule>.

ception and should not be destroyed.⁷ Although the regulations exempt churches, their cramped definition of religious employer provides no refuge for religiously affiliated universities, hospitals, and social services agencies like Catholic Charities, the “arm of compassion” of the Catholic Church.⁸ As one group that supported the ACA, the Catholic Health Association, explained: “The impact of being told we do not fit the new definition of a religious employer and therefore cannot operate our ministries following our consciences has jolted us. . . . From President Thomas Jefferson to President Barack Obama, we have been promised a respect for appropriate religious freedom.”⁹

These claims of a special right to be exempted from the dictates of civil law were met by equally vigorous claims that “all women, regardless of their employer, should be able to access the birth control coverage benefit.”¹⁰ In promulgating the regulations, the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Labor (DOL) relied on an Institute of Medicine study showing that “women have unique health care needs and burdens,” including the need for

⁷ See, e.g., Complaint at 1–2, *Eternal Word Television Network v. Sebelius*, No. 2:12-cv-00501-SLB (N.D. Ala. Feb. 9, 2012) (stating that, as a Catholic programming television station, Eternal Word Television Network (EWTN) “does not believe that contraception, sterilization, or abortion are properly understood to constitute medicine,” and that “these procedures involve gravely immoral practices, including the intentional destruction of innocent human life”). EWTN argued that “[h]aving to pay a fine to the taxing authorities for the privilege of practicing one’s religion or controlling one’s own speech is un-American, unprecedented, and flagrantly unconstitutional,” and asserted that “the Mandate can be interpreted as nothing other than a deliberate attack by the Defendants on the religious beliefs of EWTN and millions of other Americans.” *Id.* at 2–3.

⁸ See Greg Johnson, *Obama’s Fig-Leaf Compromise on Contraception Won’t Mollify Conservatives*, KNOXVILLE NEWS SENTINEL, Feb. 12, 2012, <http://www.knoxnews.com/news/2012/feb/12/obamas-fig-leaf-compromise-on-contraception-wont>. Under the regulations, an organization is an exempt “religious employer” only when it primarily employs and serves those who share its faith, seeks to inculcate its religious values, and meets Internal Revenue Service tests for a faith-based body. See *HRSA Coverage Guidelines*, *supra* note 4. Religious groups have litigated, and lost, claims that state-level contraceptive coverage mandates too narrowly define exempt religious organizations. See, e.g., *Catholic Charities v. Superior Court*, 85 P.3d 67, 95 (Cal. 2004); *Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 469 (N.Y. 2006).

⁹ Carol Keehan, *Something Has to Be Fixed*, CATHOLIC HEALTH WORLD, Feb. 15, 2012, at 1. Other religious leaders asserted that the coverage mandate treats them as “second class citizens.” See Letter from Thomas J. Olmsted, Catholic Bishop of Phx., to Brothers and Sisters in Christ (Jan. 25, 2012), available at <http://www.diocesephoenix.org/uploads/docs/RELIGIOUS-LIBERTY-INSURANCE-LETTER-013012.pdf>.

¹⁰ See, e.g., Press Release, Planned Parenthood Fed’n, Planned Parenthood Applauds HHS for Ensuring Access to Affordable Birth Control (Jan. 20, 2012), available at <http://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-applauds-hhs-ensuring-access-affordable-birth-control-38582.htm>.

contraceptive services.¹¹ Women's rights groups, such as the National Women's Law Center, cheered the Obama administration for establishing "a major milestone in protecting women's health."¹² Others decried the inclusion of even a limited exemption for religious organizations and encouraged HHS Secretary Kathleen Sebelius to hold the line against broader exemptions.¹³

These competing claims about whether and when to accommodate religious objectors arise because religious objectors are not, as a matter of federal constitutional right,¹⁴ shielded against the burdens of

¹¹ Coverage of Preventive Services Under the ACA, 77 Fed. Reg. 8725, 8727–28 (Feb. 15, 2012) (to be codified at 29 C.F.R. pt. 54) (citing INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 16 (2011)). Based on the Institute of Medicine study, HHS and DOL concluded that "[t]he contraceptive coverage requirement is . . . designed to serve the compelling public health and gender equity goals described." *Id.* at 8729.

¹² *E.g.*, Press Release, Nat'l Women's Law Ctr., HHS Decision on Contraceptive Coverage an Important Milestone (Jan. 20, 2012), available at <http://www.nwlc.org/press-release/hhs-decision-contraceptive-coverage-important-milestone>.

¹³ J. Lester Feder, *Contraceptive Rule a Pill for Obama*, POLITICO (Dec. 7, 2011, 4:47 PM), <http://www.politico.com/news/stories/1211/70036.html>.

¹⁴ See *Emp't Div. v. Smith*, 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause of the First Amendment does not require states to exempt sacramental drug use from the enforcement of neutral, generally applicable criminal laws). Whether *Employment Division v. Smith* was correctly decided or represents an improper limitation on free exercise remains a deeply contested question. See, e.g., Douglas Laycock, *The Religious Exemptions Debate*, 11 RUTGERS J.L. & RELIGION 139, 150 n.44 (2009); Symposium, *Twenty Years After Employment Division v. Smith: Assessing the Twentieth Century's Landmark Case on the Free Exercise of Religion and How It Changed History*, 32 CARDOZO L. REV. 1655 (2011). Nevertheless, I take *Smith* as a starting point for the need to secure accommodations in the legislative process.

Of course, religious objectors may receive greater protection under the federal Religious Freedom Restoration Act (RFRA) of 1993. *Cf.* Pub. L. No. 103-141, 107 Stat. 1488 (formerly codified at 42 U.S.C. §§ 2000bb-4 (1994)), (requiring strict scrutiny for all claims based on the Free Exercise Clause), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997). Although the Supreme Court in *Flores* held that the federal RFRA was unconstitutional as applied to the states, religious objectors may receive protection from statutes in sixteen states mirroring the federal RFRA. See Christopher C. Lund, *Religious Liberty After Gonzales: A Look at State RFRA's*, 55 S.D. L. REV. 466, 477 (2010) (listing RFRA's in Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Virginia); Eugene Volokh, *RFRA State Map*, UCLA SCH. L., <http://www.law.ucla.edu/volokh/relnmap.pdf> (last visited Sept. 17, 2012) (reporting states with state constitutional amendments, statutory RFRA's, and state constitutional free exercise clauses interpreted to require strict scrutiny). The state RFRA's "facially require strict scrutiny of all substantial burdens on religious practices." See Eugene Volokh, *Intermediate Questions of Religious Exemptions—A Research Agenda with Test Suites*, 21 CARDOZO L. REV. 595, 598 (1999) (arguing that although "RFRA's have more specific, binding text than does the Free Exercise Clause," they nonetheless leave a number of open questions regarding religious liberty); see also *infra* note 17 (discussing legal challenges to the coverage mandate premised on such statutory protections); *infra* note

generally applicable laws.¹⁵ Instead, as the U.S. Supreme Court specifically noted in the 1990 case, *Employment Division v. Smith*, religious groups and individuals must look to the political process for these accommodations.¹⁶

231 (discussing a recent decision that New Mexico's RFRA did not apply to actions by a commercial actor).

In addition, many state courts have interpreted their state constitutions to confer greater religious rights than the Federal Constitution. Lund, *supra*, at 466–67. Professor Christopher Lund notes that thirty states go beyond what is required by *Smith* and provide greater religious protections than federal law. *Id.* at 467; see *Smith*, 494 U.S. at 890. See generally Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. REV. 275 (discussing state constitutions and how they have been interpreted to confer heightened protection to religious groups and individuals).

¹⁵ Importantly, laws that are not neutral may also be struck down in accordance with *Smith*. See 494 U.S. at 890. A recent case from Washington, *Stormans Inc. v. Selecky*, illustrates how contextual the analysis of neutrality is. See 524 F. Supp. 2d 1245, 1266 (W.D. Wash. 2007), *vacated*, 586 F.3d 1109 (9th Cir. 2009). In *Stormans*, a group of pharmacists filed suit to preliminarily enjoin state rules lacking a conscience exemption. *Id.* The rules required them to fill prescriptions for emergency contraception, which violated their religious convictions. *Id.* The federal district court granted this injunction, finding the rules to be neither neutral nor generally applicable given evidence that “strongly suggests that the overriding objective of the [rule] was, to the degree possible, to eliminate moral and religious objections from the business of dispensing medication.” *Id.* at 1259.

On appeal, the U.S. Court of Appeals for the Ninth Circuit determined that, from the “thin” evidentiary record, the rules were neutral and generally applicable because the “object of the rules was to ensure safe and timely patient access to lawful and lawfully prescribed medications . . . [and to] eliminate all objections that do not ensure patient health, safety, and access to medication.” 586 F.3d at 1131–32, 1142. The court emphasized that the rules did not single out drugs to which pharmacists might have a religious objection. See *id.* Consequently, the Ninth Circuit vacated the injunction and remanded the case. *Id.* at 1126.

On remand, the district court conducted a twelve-day bench trial, developing a fifty-four page record of factual findings, and concluded that the rules were neither neutral nor generally applicable. 844 F. Supp. 2d 1172, 1181 (W.D. Wash. 2012). With respect to neutrality, the court found that the rules “are riddled with exemptions” that undermine their secular purpose, “but contain no such exemptions for identical religiously-motivated conduct.” *Id.* at 1190. Further, the state failed to explain why the refuse-and-refer policy for secular exemptions would create prohibitive difficulties for religious exemptions. *Id.* Lastly, the court found that “[t]he rules are not generally applicable because the State does not enforce them against all pharmacies, or even to all pharmacies with religious objections to dispensing [emergency contraception].” *Id.* at 1199. The court, applying strict scrutiny per *Smith*, concluded that the rules were unconstitutional. *Id.* at 1201.

¹⁶ See 494 U.S. at 890 (concluding that neutral and generally applicable laws do not violate the First Amendment no matter how much they burden an individual's or organization's exercise of religious liberty). The *Smith* Court emphasized:

[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government

The controversy over the coverage mandate precipitated just such a political process,¹⁷ with the Obama administration making a series of

must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id.

In January 2012, the Supreme Court, in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, held that the ministerial exception, grounded in the First Amendment's Religion Clauses, applies to an employee who works in a church-affiliated entity (for example, in a church school), based on an overall assessment of the role of the employee, which derives partially from the church's own understanding of that role. 132 S. Ct. 694, 706–07 (2012). Shortly after the decision, a number of commentators grappled with the impact of *Hosanna-Tabor* on *Smith's* broader holding that religious groups and individuals must look to the political process for protection. See, e.g., Matthew J. Franck, *What Comes After Hosanna-Tabor*, FIRST THINGS (Jan. 12, 2012), <http://www.firstthings.com/onthesquare/2012/01/what-comes-after-hosanna-tabor> (comparing *Smith's* reasoning that “a blanket rule that religious claims nearly always trigger exemptions to generally applicable laws would in effect permit every citizen to become a law unto himself,” with *Hosanna-Tabor*, which said “in effect, that when it comes to the right to govern themselves in the choice of their clergy, ministers, leaders, and others whose functions and duties are distinctly religious, churches and other religious organizations *are indeed a law unto themselves*”) (internal quotation marks omitted); see also Carl H. Esbeck, *A Religious Organization's Autonomy in Matters of Self-Governance: Hosanna-Tabor and the First Amendment*, ENGAGE, 168, 168–70 (Mar. 2012), http://www.fed-soc.org/doclib/20120322_EsbeckEngage13.1.pdf (making a similar comparison).

¹⁷ The White House has indicated that it does not believe there are “any constitutional rights issues” presented by the coverage mandate. See Press Briefing by Press Sec'y Jay Carney (Jan. 31, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/01/31/press-briefing-press-secretary-jay-carney-13112> [hereinafter January Press Briefing]. Amid this political process, thirty separate suits have been filed by religious employers to date, arguing that the contraceptive mandate, as applied to objecting religious employers, violates the First Amendment and RFRA. See, e.g., *supra* note 7 (discussing the suit brought by EWTN). These suits, which began with the EWTN suit, reached a crescendo on May 21, 2012, when “43 Catholic educational, charitable and other entities filed a dozen lawsuits in federal court . . . charging that the [coverage mandate] violates their religious freedom.” Julie Roviner, *Catholic Groups Sue Obama Administration over Birth Control Rule*, NPR (May 21, 2012, 4:20 PM), <http://www.npr.org/blogs/health/2012/05/21/153218446/catholic-groups-sue-obama-administration-over-birth-control-rule>; see *HHS Mandate Information Central*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/hhsinformationcentral> (last visited Sept. 18, 2012) (listing lawsuits); see also *supra* notes 6–7 and accompanying text (noting the religious backlash against the mandate). The University of Notre Dame, as discussed later in this Article, was among the forty-three institutions. See *infra* notes 322, 326–327 and accompanying text (discussing the lawsuits).

Also among the forty-three institutions was Wheaton College, an evangelical institution. For some, Wheaton's inclusion shows that “[t]his is not a fight over contraception. Evangelicals, in fact, don't agree with Catholics on their opposition to contraception and birth control.” Instead, the “issue is about religious freedom.” Napp Nazworth, *Wheaton College, Catholic University Jointly Sue over Birth Control Mandate*, CHRISTIAN POST (July 18, 2012, 4:01 PM), <http://www.christianpost.com/news/wheaton-college-catholic-university-jointly-sue-over-birth-control-mandate-78491/#OQD2M1jldBlgCwql.99> (quoting John Garvey, president of Catholic University of America).

attempts to quell the rancor over the coverage mandate. First, it promised to work with religious groups to address their concerns before the deadline for implementation in subsequent plan years.¹⁸ Speaking for the White House, Domestic Policy Director Cecilia Munoz reiterated the administration's commitment "to both respecting religious beliefs and increasing access to important preventive services."¹⁹ The administration extended the deadline for compliance by one year,²⁰ a concession dismissed by critics as "kicking the can down the road."²¹

These suits are now working their way through the courts with varying success. For example, in *Nebraska ex. rel. Bruning v. U.S. Department of Health & Human Services*, the U.S. District Court for the District of Nebraska granted the government's motion to dismiss the complaint without prejudice on standing and ripeness grounds. No. 4:12CV3035, 2012 WL 2913402, at *20, 24 (D. Neb. July 17, 2012). The following day, the U.S. District Court for the District of Columbia dismissed a case without prejudice brought by Belmont Abbey College, a Catholic liberal arts college, on similar grounds. See *Belmont Abbey Coll. v. Sebelius*, No. CIV.A. 11-1989 JEB, 2012 WL 2914417, at *1 (D.D.C. July 18, 2012) ("[T]he Court agrees that Belmont's injury is too speculative to confer standing and that the case is also not ripe for decision."). In August 2012, the same court dismissed Wheaton College's suit, concluding that in light of "concrete steps" by the Obama administration "to address Wheaton's concerns, including their commitment not to enforce the challenged regulations against Wheaton while accommodations are being negotiated, Wheaton has not alleged a concrete and imminent injury [necessary for] judicial review." *Wheaton Coll. v. Sebelius*, No. 12-1169, 2012 WL 3637162, at *1 (D.D.C. Aug. 24, 2012).

By contrast, the U.S. District Court for the District of Colorado granted a preliminary injunction in a suit brought by a private, for-profit company, Hercules Industries, Inc., whose formal policies are based on Catholic principles. *Newland v. Sebelius*, No. 1:12-CV-1123-JLK, 2012 WL 3069154, at *1-2 (D. Colo. July 27, 2012). The court compared the possible harms threatening the plaintiff, the government, and the public and concluded that "[o]n balance, the threatened harm to Plaintiffs, impingement of their right to freely exercise their religious beliefs, and the concomitant public interest in that right strongly favor the entry of injunctive relief." *Id.* at *5. The court, however, specifically limited the scope of its order so as not to enjoin the enforcement of the coverage mandate against other parties. *Id.* at *9.

¹⁸ See Press Briefing by Press Sec'y Jay Carney (Feb. 6, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/02/06/press-briefing-press-secretary-jay-carney-262012> [hereinafter February Press Briefing]. Until the deadline, employers would be required to direct employees seeking contraceptives to clinics or health centers. See *Just, supra* note 1, at 1-2.

¹⁹ Cecilia Munoz, *Health Reform, Preventive Services, and Religious Institutions*, THE WHITE HOUSE BLOG (Feb. 1, 2012, 6:35 PM), <http://www.whitehouse.gov/blog/2012/02/01/health-reform-preventive-services-and-religious-institutions>.

²⁰ See Memorandum from the Dep't of Health & Human Servs. on Guidance on the Temporary Enforcement Safe Harbor 2 (Feb. 10, 2012), available at <http://ccio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf> (delaying enforcement "until the first plan year that begins on or after August 1, 2013" for "non-exempted, non-grandfathered group health plans established or maintained by non-profit organizations whose plans have not covered contraceptive services for religious reasons at any point from . . . February 10, 2012[] onward," but requiring the plan to notify employees). HHS issued guidance on August 15, 2012, which clarifies that the safe harbor is avail-

The Obama administration then proffered its much-maligned “accommodation” for religious employers.²² The President explained:

[I]f a woman’s employer is a charity or a hospital that has a religious objection to providing contraceptive services as part of their health plan, the insurance company—not the hospital, not the charity—will be required to reach out and offer the woman contraceptive care free of charge without co-pays, without hassle.²³

This suggestion, too, was met with derision from critics. In a statement issued after the President’s announcement, more than five hundred scholars, university presidents, religious leaders, and others—including Catholic Cardinal Timothy Dolan, archbishop of New York and president of the U.S. Council of Bishops—labeled the accommodation “unacceptable,” hiding a “grave violation” of religious liberty behind a “cheap accounting trick.”²⁴

able to plans that object to covering “some but not all contraceptive[s],” as well as to objectors who unsuccessfully attempted before the February 10, 2012 safe harbor date to exclude or limit contraceptive coverage in their plans. See Memorandum from the Dep’t of Health & Human Servs. on Guidance on the Temporary Enforcement Safe Harbor 1 (August 15, 2012), available at <http://ccio.cms.gov/resources/files/prev-services-guidance-08152012.pdf>. But see *H.H.S. 1-Year Extension May Not Apply to Student Plans*, CAMPUS NOTES: THE CARDINAL NEWMAN SOC’Y BLOG (Feb. 2, 2012, 9:20 AM), <http://blog.cardinalnewman.society.org/2012/02/02/hhs-1-year-extension-may-not-apply-to-student-plans> [hereinafter CAMPUS NOTES] (discussing the possible exemptions to the extension).

²¹ Johnson, *supra* note 8 (quoting the Catholic Archbishop of Miami, Thomas Wenski).

²² See Certain Preventive Services Under the Affordable Care Act, 77 Fed. Reg. 16,501, 16,503 (Mar. 21, 2012) (to be codified at 26 C.F.R. pt. 54) (advance notice of proposed rulemaking); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8728 (Feb. 15, 2012) (to be codified at 29 C.F.R. pt. 54).

²³ See Richard Wolf, *Obama Tweaks Birth Control Rule*, USA TODAY (Feb. 10, 2012, 3:57 PM), <http://content.usatoday.com/communities/theoval/post/2012/02/source-obama-to-change-birth-control-rule/1> (noting that “White House officials took pains to avoid the word ‘compromise,’ [because] under the accommodation, no woman who wants access to contraceptives should be denied”).

²⁴ John Garvey et al., *Unacceptable*, BECKET FUND FOR RELIGIOUS LIBERTY, 1 (Apr. 11, 2012), <http://www.becketfund.org/wp-content/uploads/2012/04/Unacceptable-4-11.pdf> (observing that “it is unrealistic to suggest that insurance companies will not pass the costs of these additional services on to the purchasers,” and thus “[i]t is no answer to respond that the religious employers are not ‘paying’ for this aspect of the insurance coverage”). Other critics have also labeled the accommodation a “shell game.” See Wolf, *supra* note 23 (quoting law professor Robert Destro of Catholic University).

Religious objections have come not only from Catholics, but also from representatives of numerous Muslim, mainline Christian, and evangelical Christian universities. See generally *id.* (including as signatories the leaders of Arizona Christian University, Biola University, Dordt College, East Texas Baptist University, Houston Baptist University, Oklahoma

At each step, the Obama administration has responded that its position strikes “the appropriate balance between religious beliefs and the need to provide preventive services to American women.”²⁵ White House Chief of Staff Jacob Lew maintained that this final accommodation “set[s] out [the administration’s] policy. . . . We are going to finalize it in the final rules [because] we think that’s the right approach.”²⁶

Baptist University, Oklahoma Christian University, Southeastern Baptist Theological Seminary, Southern Baptist Theological Seminary, Union University, and Zaytuna College, among other religious institutions of higher education).

²⁵ See February Press Briefing, *supra* note 17. The ACA has drawn criticism on other grounds as well, including the creation of perverse incentives for employers to drop lower-income or sick employees on the insurance exchanges. See David Gamage, *How the Affordable Care Act Will Create Perverse Incentives Harming Low and Moderate Income Workers*, TAX L. REV. (forthcoming 2012) (manuscript at *2–3), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2067138; Amy Monahan & Daniel Schwarz, *Will Employers Undermine Health Care Reform by Dumping Sick Employees?*, 97 VA. L. REV. 125, 172–80 (2011) (discussing the post-ACA incentives for employers to discontinue health care coverage for sick employees); Richard A. Epstein & David A. Hyman, *Why Obamacare Will End Health Insurance as We Know It*, ISSUES 2012 (Manhattan Inst. for Policy Research, New York, N.Y.), Mar. 2012, at 3, available at http://www.manhattan-institute.org/pdf/ir_7.pdf (characterizing President Obama’s promise that under the ACA, “you can keep your own insurance,” as inconsistent with changes dictated by the ACA to “key contractual provisions in ways that make existing coverage unaffordable, or unavailable at any price”).

Among the perverse incentives created by the ACA are that:

The ACA . . . deter[s] low- and moderate-income taxpayers from accepting jobs with employers that offer “affordable” health insurance; . . . discourage[s] many low- and moderate-income taxpayers from attempting to increase their household incomes; . . . dissuade[s] employers from hiring low- and moderate-income taxpayers and . . . encourage[s] employers to reduce the salaries paid to some low- and moderate-income employees; . . . prompt[s] employers to shift some low- and moderate-income employees from full-time to part-time positions; . . . [and] induce[s] employers to stop offering ‘affordable’ health insurance to at least some low- and moderate-income employees . . .

See Gamage, *supra*, at *2–3.

²⁶ See *Obama Chief of Staff: No More Compromise, Contraceptive Rule Is Done Deal*, FOX-NEWS.COM (Feb. 12, 2012), <http://www.foxnews.com/politics/2012/02/12/obama-chief-staff-no-more-compromise-contraceptive-rule-is-done-deal>. The Obama administration finalized the regulations on February 15, 2012. See *Coverage of Preventive Services Under the ACA*, 77 Fed. Reg. at 8728. Since the Obama administration signaled its unwillingness to compromise further, the U.S. Department of Justice has asked the U.S. District Court for the Western District of Pennsylvania to dismiss a suit challenging the coverage mandate because “the administration is working on an amendment to address the religious objections.” Brian Bowling, *Feds Ask Judge to Dismiss ‘Morning-After’ Lawsuit*, PITTSBURGH TRIB.-REV. (May 1, 2012, 1:44 PM), <http://triblive.com/home/1292708-74/college-lawsuit-drugs-says-amendment-geneva-administration-coverage-department-federal> (reporting the government’s additional argument that the plaintiff “cannot satisfy the imminence requirement for standing”); see Defendants’ Memorandum of Law in Support of Their Motion to Dismiss at 2–3, 6, *Geneva College v. Sebelius*, No. 2:12-cv-00207-JFC (W.D. Pa. Feb. 21, 2012).

At least one later poll suggests that a majority of the American people in fact believe that exemptions for religious employers are warranted.²⁷

These claims for exemption from the coverage mandate are far from the only claims for accommodation being made by religious groups today.²⁸ Since 2009, two major medical centers have “revers[ed] a long-standing policy exempting employees who refuse[d to assist with abortions] based on religious or moral objections.”²⁹ In each case, nurses alleged that they were threatened with firing or professional discipline for resisting participation in or training for abortions. In both cases, the nurses sued, asserting both constitutional and statutory rights³⁰ to not assist in abortion procedures in violation of their moral

²⁷ In a March 2012 poll, 57% of Americans responded that religiously affiliated employers, such as hospitals or universities, should be allowed to opt out of mandated coverage for birth control. See Jim Rutenberg & Marjorie Connelly, *Obama's Rating Falls as Poll Reflects Volatility*, N.Y. TIMES, Mar. 13, 2012, at A1. Of those responding, 61% of men supported an opt-out, compared to 53% of women. See *id.* Among all respondents, 37% believed the debate to be over religious freedom, whereas 51% thought it centered on “women’s health and their rights.” N.Y. TIMES & CBS NEWS, 2012 POLL 22 (Mar. 7–11, 2012), available at <http://s3.documentcloud.org/documents/324884/new-york-times-cbs-poll.pdf>. A poll commissioned by Planned Parenthood in 2012 found that “[o]nly 39% of voters support an exemption for Catholic hospitals and universities from providing the benefit, while 57% are opposed to one.” See Tom Jensen, *Our Polling on the Birth Control Issue*, PUB. POL’Y POLLING (Feb. 10, 2012, 10:24 AM), <http://www.publicpolicypolling.com/main/2012/02/our-polling-on-the-birth-control-issue.html>.

²⁸ Questions of conscientious objections arise in other contexts, too. See generally Thaddeus Mason Pope, *Legal Briefing: Conscience Clauses and Conscientious Refusal*, 21 J. CLINICAL ETHICS 163 (2010) (surveying conscientious refusal laws and reviewing recent related legislative developments and lawsuits).

²⁹ Rob Stein, *N.J. Nurses Sue over Abortion Policy*, WASH. POST, Nov. 28, 2011, at A2 (discussing a lawsuit against the University of Medicine and Dentistry of New Jersey (UMDNJ)).

³⁰ Federal conscience protections contemporaneous with the Supreme Court’s landmark 1973 decision in *Roe v. Wade* provide that:

No entity which receives [certain grants, contracts, loans or loan guarantees], may—

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) discriminate in the extension of staff or other privileges to [such] personnel,

because he performed or assisted . . . a lawful sterilization procedure or abortion, [or] refused to perform or assist [one] . . . [due to] his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.

42 U.S.C. § 300a-7(c)(1) (2006) (popularly known as the “Church Amendment”); see also *Roe v. Wade*, 410 U.S. 113, 166–67 (1973) (holding that a woman’s decision to have an abortion is protected by her right to privacy under the Due Process Clause of the Fourteenth Amendment to the Constitution). Twenty states similarly provide conscientious objectors with an absolute exemption from participating in sterilizations and abortions. See

or religious convictions.³¹ Those suits reached very different outcomes.³²

Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Health Care Context*, in SAME-SEX MARRIAGE AND RELIGIOUS LIBERTY: EMERGING CONFLICTS 77, 299–327 (Douglas Laycock et al. eds., 2008) [hereinafter EMERGING CONFLICTS].

³¹ In 2011, in *Danquah v. University of Medicine and Dentistry of New Jersey*, a dozen nurses sued UMDNJ in federal court, alleging that they were forced, under threat of professional discipline or dismissal, to assist with abortions in violation of their moral or religious convictions. See Verified Complaint at 2, 14–15, *Danquah v. Univ. of Med. & Dentistry of N.J.*, No. 2:11-cv-06377-JLL-MAH (D.N.J. Oct. 31, 2011), available at <http://www.lifenews.com/wp-content/uploads/2011/11/newjerseynursesabortion.pdf> (alleging violations of U.S. CONST. amend XIV, 42 U.S.C. §§ 300a-7(d), 1983 (2006), and N.J. STAT. ANN. § 2A:65A-1 (West 2000)); see also Transcript of Proceedings at 4–5, *Danquah*, No. 2:11-cv-06377-JLL-MAH (Dec. 22, 2011), available at <http://www.adfmedia.org/files/DanquahSettlementTranscripts.pdf> [hereinafter *Danquah Transcript of Proceedings*] (noting the nurses' strong religious beliefs). The nurses alleged that in 2011, UMDNJ changed its policy of assigning only willing same-day surgery unit nurses to participate in abortion procedures. Verified Complaint, *supra*, at 7. In a marked departure from this policy, hospital staff "repeatedly [told] them and their colleagues that they must assist abortions or they would be terminated . . . [and] that any objecting nurses might theoretically be relocated to significantly less favorable job positions." *Id.* at 7–8. Staff required some nurses, including Sharon L. Danquah, to train for abortions without providing them with advance notice. *Id.* at 9. When Danquah objected on religious grounds, a staff member responded that the hospital "has 'no regard for religious beliefs' of nurses who so object, that 'everyone on this floor is required when assigned to do TOPs [terminations of pregnancy; abortions],' that such nurses 'are trained to care for patients' elective procedures,' and that 'no patients can be refused by any nurse.'" *Id.* The objecting nurses requested and received a temporary restraining order on November 3, 2011. Temporary Restraining Order at *2, *Danquah*, No. 2:11-cv-06377-JLL-MAH (Nov. 3, 2011), available at <http://www.adfmedia.org/files/DanquahTRO.pdf>.

Two years earlier, in *Cenzon-DeCarlo v. Mount Sinai Hospital*, an operating room nurse brought suit in the U.S. District Court for the Eastern District of New York against her employer, claiming that she was coerced into assisting with a late-term, twenty-two-week abortion, in violation of the Church Amendment. See Memorandum in Support of Motion for Preliminary Injunction at 6, *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 2010 WL 169485 (E.D.N.Y. 2010) (No. 09-03120), *aff'd*, 626 F.3d 695, 697 (2d Cir. 2010), available at <http://oldsite.alliancedefensefund.org/userdocs/Cenzon-DeCarloPIbrief.pdf> [hereinafter Memorandum for Preliminary Injunction]. The plaintiff, Cathy Cenzon-DeCarlo, alleged that although the hospital had staffed around her religious objection to assisting with abortions for years, on May 24, 2009, her superior threatened not only to terminate her if she did not help with an abortion, but also to report her to the nursing board for "patient abandonment." See *id.*

³² *Danquah* was fully resolved by a settlement on the record memorializing the parties' agreement that, except when the mother's life is at risk and there are no other non-objecting staff members available to assist, nurses with conscientious objections will not have to assist with abortions. See *Danquah Transcript of Proceedings*, *supra* note 31, at 5–6. In such rare cases, "the only involvement of the objecting plaintiffs would be to care for the patient until such time as a non-objecting person can get there to take over the care." *Id.* at 6. Judge Jose Linares retained jurisdiction over the matter to ensure compliance with the agreement. *Id.* at 5. By contrast, the federal district court hearing the *Cenzon-DeCarlo* case dismissed the suit, concluding that the Church Amendment did not confer a private right of action. See *Cenzon-DeCarlo*, 2010 WL 169485 at *4. The decision was affirmed by the

While the clashes over contraception and abortion play out on the national stage, parallel claims for religious accommodations have been advanced in several states that have considered, and in some cases enacted, same-sex marriage legislation.³³ Religious objectors to same-sex marriage have asked for a way to both honor their religious convictions and comply with the law.³⁴ Specifically, they have asked to step aside from celebrating, facilitating, or recognizing same-sex marriages when doing so would violate their religious beliefs.

In a May 2012 statement to ABC News, the first of its kind by a sitting president, President Obama supported the rights of same-sex couples to get married.³⁵ At the same time, President Obama said that the state should respect religious liberty: “[I]t’s important to recognize that folks who feel very strongly that marriage should be defined narrowly as between a man and a woman, many of them are not coming at it

U.S. Court of Appeals for the Second Circuit. *Cenzon-DeCarlo*, 626 F.3d at 697, 699; see also Robin Fretwell Wilson, *Empowering Private Protection of Conscience*, 9 AVE MARIA L. REV. 101, 104 (2010) (dissecting the legislative history of the Church Amendment and concluding that it does not support a private right of action). *Cenzon-DeCarlo* filed separate state court claims that are currently on appeal. See *Cenzon-Decarlo v. Mount Sinai Hosp.*, Nos. 2011-02282, 2011-07705 (N.Y. App. Div. Apr. 12, 2010).

The New Jersey statute cited in Danquah’s complaint, which states that “[n]o person shall be required to perform or assist in the performance of an abortion or sterilization,” provides an unqualified exemption for objectors to those procedures. See N.J. STAT. ANN. 2A:65A-1. Concerns that unqualified exemptions impose hardships on those seeking procedures or services are not unfounded. As Part IV of this Article explains, exemptions qualified by hardship are necessary to equitably balance both access and religious liberty. See *infra* notes 208–246 and accompanying text; see also Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Health Care Procedures*, 34 AM. J.L. & MED. 41, 41 n.5 (2008) [hereinafter Wilson, *Limits of Conscience*] (arguing that exemptions for pharmacies from the duty to stock emergency contraceptives pose a much greater threat to patient access than exemptions for individual pharmacists, and offering instead that state legislatures should prefer individual exemptions over institutional ones provided that the individual exemptions are qualified by hardship to patients).

³³ See *infra* app. A (collecting state statutory provisions relating to same-sex marriage).

³⁴ To be clear, not all religious believers object to same-sex marriage. In fact, some denominations allow ministers to choose whether to marry same-sex couples, resulting in internal divisions over whether to perform same-sex marriages. See, e.g., Shaila Dewan, *True to Episcopal Church’s Past, Bishops Split on Gay Weddings*, N.Y. TIMES, July 19, 2011, at A1 (noting that in New York City, two out of five Episcopalian dioceses allow same-sex couples to be married in church); *Churches Debate: May Clergy Marry Gays?*, USA TODAY, July 17, 2011, http://www.usatoday.com/news/religion/2011-07-17-gay-marry-clergy-churches_n.htm.

³⁵ See Melissa Rogers, *Obama and the Two Types of Marriage*, HUFFINGTON POST (May 17, 2012, 11:42 AM), http://www.huffingtonpost.com/melissa-rogers/civil-and-religious-marriage-and-obama_b_1521981.html; Sam Stein, *Obama Backs Gay Marriage*, HUFFINGTON POST (May 9, 2012, 2:59 PM), http://www.huffingtonpost.com/2012/05/09/obama-gay-marriage_n_1503245.html.

from a mean-spirited perspective. They're coming at it because they care about families."³⁶

Like President Obama, many state legislators have struggled with reconciling two compelling, and at times conflicting, values in the same piece of legislation—marriage equality and religious liberty. They perceive difficult tradeoffs, such as how to protect religious liberty without offending the dignity of same-sex couples or condoning anti-gay animus, among other concerns. The real-world points of resistance that state lawmakers articulate echo the concerns voiced about exemptions to the new coverage mandate.

This Article summarizes a number of sticking points voiced to me by legislators about a hardship exemption that I, and others, have tried to secure in state same-sex marriage laws, together with some responses that may be offered.³⁷ Assuming that spoken concerns reflect real ones, as I believe they do, it is worthwhile to examine points of resistance to religious liberty protections in same-sex marriage laws as a way of testing the strength of claims for exemptions on other questions over which the public remains deeply divided.

Part I explores the threshold question troubling many legislators: if the political will is there to recognize same-sex marriage, why should

³⁶ Rogers, *supra* note 35 (quoting President Obama).

³⁷ This Article draws on a series of letters I coauthored arguing for the inclusion of robust exemptions in same-sex marriage bills, including letters to New Hampshire governor John Lynch, D.C. City Council chairman Vincent Gray, New York Senate majority leader Dean Skelos, Maryland state senator Brian Frosh, Connecticut state representative Christopher G. Donovan, New Jersey state senator Paul Sarlo, Washington governor Christine Gregoire, New Jersey governor Chris Christie, and the Iowa State Legislature, as well as a letter about the proposed rescission of the Bush Conscience Regulation to the HHS's Office of Public Health and Science. See *Memos/Letters on Religious Liberty and Same-Sex Marriage*, MIRROR OF JUST. (Aug. 2, 2009, 12:59 AM), <http://mirrorofjustice.blogs.com/mirrorofjustice/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html> (providing the full text of some of these letters). The remaining letters are on file with the author.

This Article also draws on a model religious liberty provision that two groups of legal scholars have crafted and advocated for in jurisdictions considering same-sex marriage legislation. See *infra* app. B. One group of scholars consists of myself, Thomas C. Berg of the University of St. Thomas School of Law, Carl H. Esbeck of the University of Missouri School of Law, Edward McGlynn Gaffney, Jr. of Valparaiso University School of Law, Richard W. Garnett of the University of Notre Dame Law School, and Marc D. Stern, member of the New York State Bar for Legal Advocacy. This group takes no position for or against same-sex marriage, but argues that robust religious liberty protections should be included in any legislation. The second group, led by Douglas Laycock of the University of Virginia School of Law, consists of Professor Laycock, Marc D. Stern, and Michael Perry of Emory University School of Law, all of whom explicitly endorse same-sex marriage. In May 2012, Bruce Ledewitz of Duquesne University School of Law joined the second group.

the legislature accommodate anyone?³⁸ This Part offers a simple response: exemptions serve the interests of same-sex marriage supporters—in addition to being the right thing to do and maximizing individual liberty.³⁹ This Part contends that without accommodations, public attitudes about same-sex marriage are likely to harden, delaying marriage equality. It charts how a winner-takes-all approach to same-sex marriage—offering exemptions only to the clergy, who do not need them because of the First Amendment—has failed to garner sufficient support to become law. By contrast, bills providing meaningful protections for religious objectors have succeeded, suggesting that religious exemptions take a powerful argument away from same-sex marriage opponents. Part I then explores how an inflexible approach to requests for religious accommodations to the coverage mandate may likewise backfire if not tempered.

The Article then turns to a host of practical considerations raised by religious liberty accommodations. Part II asks, as District of Columbia councilmember Phil Mendelson did, “how . . . policy maker[s] can know . . . that [a religious objector] is really acting on fundamental religious belief [rather than] prejudice?”⁴⁰ Section A argues that although sincerity issues do arise, the significant personal cost of objecting gives objectors little incentive to make insincere claims. Further, courts have shown the institutional competence to separate sincere from insincere claims in a range of contexts, from military conscientious objections to suits by prisoners. Section B then considers a related concern in the health care context—that exemptions legitimize scientifically unfounded ideas. This Section recaps the argument made by family planning advocates that emergency contraceptives like Plan B act only to prevent fertilization—and never after. This Section reviews emerging evidence about ella’s mechanisms of action that shows that ella’s enhanced effectiveness in preventing pregnancy stems in part from post-fertilization effects. More fundamentally, Section B argues that if claims of faith receive protection only when the rest of society

³⁸ See *infra* notes 46–109 and accompanying text.

³⁹ See *infra* note 46 (discussing the goods served by having the personal liberty to live out one’s sexual identity and one’s religious identity).

⁴⁰ See *infra* notes 110–163 and accompanying text; see also *Religious Liberty Implications of D.C.’s Same-Sex Marriage Bill: Hearing on Bill 18-482 Before the D.C. Council*, 19th Sess. 6:59:40 (Nov. 2, 2009) [hereinafter *Hearing on D.C.’s Same-Sex Marriage Bill*] (statement of councilmember Phil Mendelson), *videorecording available at* http://oct.dc.gov/services/on_demand_video/channel13/november2009/11_02_09_JUDICI.aspx.

agrees with the objector's belief, then almost nothing would remain of religious freedom.

Part III then explores how broad any legislative accommodation should be.⁴¹ This Part examines whether religious objectors should be protected only when they are noncommercial actors or when directly performing a morally freighted service, like solemnizing a marriage or terminating a pregnancy. It argues that appropriately crafted exemptions can avoid the real concern driving efforts to cabin an exemption's scope—dislocation to the individuals seeking the contested service.

Part IV assesses a claim made by White House press secretary Jay Carney that the coverage mandate “does not direct an individual to do anything,” and so there can be no real threat to religious liberty.⁴² The Part first documents the steep penalties that religious objectors face in both the health care and same-sex marriage contexts without specific protections. It then takes the claim at face value, concluding that if the changing legal landscape really does not direct objectors to do anything, then religious accommodations cost nothing to grant but can allay significant fears at a time of great social change.

Part V explores the notion that no one should have to bear the cost of another's religious objection, a claim now made in fights over both the coverage mandate and same-sex marriage.⁴³ This Part first explains that appropriately crafted exemptions can vindicate both values at stake: access and religious liberty. It then acknowledges that qualified exemptions—that is, accommodations that allow religious objectors to avoid civil dictates only when a hardship will not result for those seeking a service—impose some costs on both sides, but also turn down the temperature on heated social debates.

Part VI then explores the question of hardship in the especially difficult context of insurance benefits, both for same-sex spouses and for deeply divisive services like contraception.⁴⁴ This Part argues that failing to include religious accommodations in benefit mandates often leads to greater hardships—namely, the choice to discontinue objectionable coverage rather than violate a religious belief. Religious objectors have resorted to this “nuclear option” on multiple occasions when an exemption was not forthcoming, and they may continue to do so. Outside the health care context, religious objectors can take the nuclear option at no real cost. Even after the ACA, the nuclear option re-

⁴¹ See *infra* notes 164–207 and accompanying text.

⁴² January Press Briefing, *supra* note 17; see *infra* notes 208–246 and accompanying text.

⁴³ See *infra* notes 247–288 and accompanying text.

⁴⁴ See *infra* notes 289–357 and accompanying text.

mains available to institutions that object to the coverage mandate— notwithstanding the steep penalties the ACA imposes on larger employers that drop health care coverage for their employees. Indeed, many employers that drop coverage are likely to come out ahead financially. This Part then asks a question almost entirely overlooked in the controversy over the coverage mandate: what happens to the individual who morally objects to contraceptives and sterilization—what do they do after the ACA? For them, the penalties are likely to be draconian, imposing a significant encroachment on religious liberty.

Part VII tackles the idea that accommodations for religious objectors should not be allowed because of harm to the dignity of others.⁴⁵ It argues that legislators frequently must address two dignitary harms, not one—for example, the harm to lesbian and gay couples who are turned aside and the harm to religious believers who are told that their beliefs are not to be tolerated, at least not in the public sphere. Although the competing claims about dignitary losses cannot resolve the question of whether to give accommodations, they can and should guide the structure of accommodations to cabin the possibility of dignitary harm.

Finally, the Article concludes that in the end, no matter how thoughtful an exemption or a claim for exemptions may be, to realistically obtain religious liberty protection in the legislative or regulatory process requires proponents to understand how exemptions look to decisionmakers on the ground.

I. FIRST STICKING POINT: WHY ACCOMMODATE ANYONE?

Like the Obama administration's evolving efforts to vindicate two competing values—access and religious freedom—state legislators have had to confront the obvious question: if the political will is there to recognize same-sex marriage, why should the state accommodate anyone? The short answer is this: self-interest.

Before describing why religious liberty guarantees are in the interest of *both* sides, in *both* debates, I should note that this focus on pragmatic considerations is not intended to detract from principled arguments favoring exemptions. The same fundamental values of personal liberty that support an individual's right to follow and fulfill his or her essential identity, including sexual identity and same-sex relationships, also support an individual's right to live according to his or her religious

⁴⁵ See *infra* notes 358–365 and accompanying text.

convictions.⁴⁶ Not all observers agree with such principled arguments, however.⁴⁷ For such people, a practical argument may have an appeal, even when more normative claims do not. So let's talk practicality.

A. *Religious Accommodations Are a Pathway to Same-Sex Marriage*

In the absence of accommodations, public attitudes toward same-sex relationships are likely to become more divided, not less, as Professor Douglas Laycock has noted:

To impose legal penalties or civil liabilities on a wedding planner who refuses to do a same-sex wedding, or on a religious counseling agency that refuses to provide marriage counseling to same-sex couples, will simply ensure that conservative religious opinion on this issue can repeatedly be aroused to fever pitch. Every such case will be in the news repeatedly, and every such story will further inflame the opponents of same-sex mar-

⁴⁶ Professor Chai Feldblum argues that the "identity liberty" same-sex couples have in marriage and the "belief liberty" objectors have in their religion both constitute core values and deserve protection, but these values directly conflict when civil rights laws force one to accommodate the other. See Chai R. Feldblum, *Moral Conflict and Conflicting Liberties*, in EMERGING CONFLICTS, *supra* note 30, at 123, 157. Professor Feldblum concludes that the conduct demanded by civil rights laws "can burden an individual's belief liberty interest," but "[a]cknowledging [the burden's impact] does *not* necessarily mean that [civil rights] laws will be invalidated or that exemptions . . . will always be granted to individuals holding such beliefs." *Id.*; see also Thomas C. Berg, *What Same-Sex Marriage and Religious-Liberty Claims Have in Common*, 5 NW. J.L. & SOC. POL'Y 206, 219–20, 230–32 (2010) (critiquing Professor Feldblum's argument). Many other scholars also offer principled arguments. See generally Taylor Flynn, *Clarion Call or False Alarm: Why Proposed Exemptions to Equal Marriage Statutes Return Us to a Religious Understanding of the Public Marketplace*, 5 NW. J.L. & SOC. POL'Y 236 (2010) (arguing that religious objections to same-sex marriage do not necessitate additional statutory protections because those objections predate the debate over same-sex marriage); Maggie Gallagher, *Why Accommodate? Reflections on the Gay Marriage Culture Wars*, 5 NW. J.L. & SOC. POL'Y 260 (2010) (discussing four reasons to maintain religious liberty accommodations for those opposed to same-sex marriage); Ira C. Lupu & Robert W. Tuttle, *Same-Sex Equality and Religious Freedom*, 5 NW. J.L. & SOC. POL'Y 274 (2010) (distinguishing between freedom of clergy and claims of "religiously motivated individuals," and concluding that although some religious freedoms are sufficiently protected under the U.S. Constitution, others receive less protection, and thus same-sex marriage opponents would be wise to find common ground to secure robust exemptions now rather than wait); Marc D. Stern, *Liberty v. Equality; Equality v. Liberty*, 5 NW. J.L. & SOC. POL'Y 307 (2010) (advocating qualified religious exemptions as a solution to preserving religious liberty without diminishing the equality of same-sex couples); Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws*, 5 NW. J.L. & SOC. POL'Y 318 (2010) (arguing that government employees with religious objections should be granted exemptions).

⁴⁷ See, e.g., Shannon Gilreath, Book Review Essay, *Not a Moral Issue: Same-Sex Marriage and Religious Liberty*, 2010 U. ILL. L. REV. 205, 221.

riage. Refusing exemptions to such religious dissenters will politically empower the most demagogic opponents of same-sex marriage. It will ensure that the issue remains alive, bitter, and deeply divisive.⁴⁸

By creating religious martyrs, the likely outcome is to delay social acceptance of gay marriage, not to hasten it.

In the United States, our over-decade-long experience with attempts to secure legislation recognizing same-sex marriage suggests that religious accommodations likely have helped same-sex marriage advocates secure long-sought victories. To date, seven jurisdictions have enacted, and retained, laws recognizing same-sex marriage: Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington.⁴⁹

In three of those states—New York, Maryland, and Washington—proposed legislation offering protection only to the clergy failed to garner enough support to become law only months before revised bills passed.⁵⁰ The fact that same-sex marriage bills with more expansive

⁴⁸ See Letter from Douglas Laycock to Me. Governor John Baldacci, in SHANNON GILREATH, *THE END OF STRAIGHT SUPREMACY: REALIZING GAY LIBERATION* 260, 260–61 (2011) (predicting that “[t]he number of people who assert their right to conscientious objection will be small in the beginning, and it will gradually decline to insignificance if deprived of the chance to rally around a series of martyrs”).

⁴⁹ See *infra* app. A. Maine’s same-sex marriage law, which contained a clergy-only exemption, was repealed in a “people’s referendum,” and a similar measure passed the New Hampshire legislature only to be vetoed by Governor John Lynch. See generally Robin Fretwell Wilson, *Charting the Success of Same-Sex Marriage Legislation* (Sept. 1, 2012) (unpublished manuscript), available at <http://scholarlycommons.law.wlu.edu/wlufac/132> (summarizing the history of same-sex marriage legislation in every state to consider it to date). The New Hampshire legislature amended the bill to include more expansive exemptions and Governor Lynch subsequently signed it into law. See *id.*

⁵⁰ On May 12, 2009, the New York Assembly passed legislation containing a clergy-only exemption by a vote of 89–52—only to see it defeated in the New York Senate on December 2, 2009, by a vote of 24–38. See Jeremy W. Peters, *Making Gay Marriage Personal and Political*, N.Y. TIMES, May 12, 2009, at A1; Dwyer Arce, *New York Senate Rejects Same-Sex Marriage Legislation*, JURIST (Dec. 2, 2009, 3:19 PM), <http://jurist.org/paperchase/2009/12/new-york-senate-rejects-same-sex.php>. See generally Wilson, *supra* note 49 (summarizing the development of the key issues in the same-sex marriage legislation of New York, Maryland, and Washington). Two years later, Governor Andrew M. Cuomo proposed the Marriage Equality Act, a revised bill that included more expansive religious liberty protections. See *infra* app. A. The New York Assembly approved that bill on June 15, 2011, by a vote of 80–63. Kenneth Lovett, *New York Assembly Passes Bill to Legalize Gay Marriage 80-63; Legislation Now Heads to Senate*, N.Y. DAILY NEWS, June 15, 2011, http://articles.nydailynews.com/2011-06-15/local/29681615_1_gay-marriage-exemptions-from-anti-discrimination-laws-senate-republicans. The New York Senate then revised the bill to include yet more protections, facilitating the bill’s passage on June 24, 2011 by a vote of 33–29. See Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 25, 2011, at A1. Although robust

protections were enacted such a short time later suggests that exemptions mattered to the ultimate success of those bills.⁵¹ A number of observers drew precisely this conclusion.

protections played an important role in New York, so too did money and political maneuvering in convincing Senate Majority Leader Dean Skelos to allow the bill to reach the Senate floor in the first place. Strenuous lobbying by Governor Cuomo and New York City mayor Michael Bloomberg persuaded Skelos not to block the vote, and must have also persuaded some Republican members of the Senate to support the final bill. *See* Michael Barbaro, *Behind Gay Marriage, an Unlikely Mix of Forces*, N.Y. TIMES, June 26, 2011, at A1; Nicholas Confessore & Michael Barbaro, *Wealthy Donors to G.O.P. Are Providing Bulk of Money in Gay Marriage Push*, N.Y. TIMES, May 14, 2011, at A15; Thomas Kaplan, *After Pushing Gay Marriage, Cuomo Is Thanked with Money*, N.Y. TIMES, Dec. 2, 2011, at A29.

Efforts to pass same-sex marriage legislation in Maryland followed a similar trajectory. In 2008, Maryland legislators introduced bills containing clergy-only exemptions, but neither House Bill 351 nor Senate Bill 290 was voted upon by either chamber. *See generally* Wilson, *supra* note 49 (summarizing same-sex marriage legislation in Maryland). In 2009, bills containing identical clergy-only exemptions died in their respective committees. *Id.* In 2011, the Maryland House considered two bills that contained the same clergy-only exemption. *Id.* The Senate, however, added more expansive protections for religious objectors to the original House bill. *Id.* The Senate passed the bill by a vote of 25–21 on February 24, 2011, but the bill languished in a House committee, never to be voted upon by the full House. *See id.* In the next legislative session, the House took up legislation proposed by Governor Martin O'Malley, which contained additional protections. *See id.* The Maryland House passed that bill on February 17, 2012, by a vote of 72–67, and the Senate approved it on February 23, 2012 by a vote of 25–22. *See* Sabrina Tavernise, *In Maryland, House Passes Bill to Allow Gays to Wed*, N.Y. TIMES, Feb. 18, 2012, at A13; *see also* John Wagner, *Same-Sex Marriage Bill Nears Passage*, WASH. POST, Feb. 24, 2011, at B1 (reporting that the Maryland Senate preliminarily voted in favor of same-sex marriage by a vote of 25–22). Nevertheless, opponents of the bill collected enough signatures to prevent the Maryland law from taking immediate effect, and it will be considered in a referendum in November 2012. *See* Rebecca Berg, *In Maryland, Gay Marriage Seeks a "Yes" at the Polls*, N.Y. TIMES, Aug. 26, 2012, at A16.

In Washington, a bill offering protection only to clergy failed to gain traction in 2011 and was reintroduced in 2012. *See generally* Wilson, *supra* note 49 (discussing the legislative history of Washington's same-sex marriage bill). Legislators then introduced a competing bill containing more robust protections, which was substantially amended and ultimately passed the Senate on February 1, 2012 by seven votes, with a total vote of 28–21. *See id.* The Washington House passed the Senate's engrossed bill by a vote of 55–43 on February 8, 2012. *Id.* The bill was signed into law by Governor Christine Gregoire on February 13, 2012. *See* Joel Connelly, *Gregoire Signs Same-Sex Marriage Bill*, SEATTLE POST-INTELLIGENCER (Feb. 13, 2012, 1:00 PM), <http://www.seattlepi.com/local/connelly/article/Make-History-Gregoire-signs-same-sex-marriage-3312315.php>; Andrew Garber, *Gay-Marriage Bill Passes House, Awaits Gregoire's Signature*, SEATTLE TIMES (Feb. 9, 2012, 2:18 PM), http://seattletimes.nwsource.com/html/localnews/2017459861_gaymarriage09m.html. Like Maryland's law, the law legalizing same-sex marriage in Washington was placed on hold in June 2012, when opponents gathered sufficient signatures to block the law from taking immediate effect pending a November 2012 referendum on the legislation. *See* Laura L. Myers, *Gay Marriage in Washington Blocked by Proposed Referendum*, REUTERS (June 6, 2012, 7:33 PM), <http://www.reuters.com/article/2012/06/06/us-usa-gaymarriage-washington-idUSBRE851JE20120606>.

⁵¹ The two exceptions to this pattern are Connecticut and Maine. In 2007, Connecticut considered, and failed to pass, proposed same-sex marriage legislation containing protec-

After Governor Andrew Cuomo signed New York's same-sex marriage law in the summer of 2011, the *New York Times* observed that the religious exemptions "proved to be the most microscopically examined and debated—and the most pivotal—in the battle over same-sex marriage. Language that Republican senators inserted into the bill legalizing same-sex marriage provided more expansive protections for religious organizations and helped pull the legislation over the finish line"⁵² Similarly, in Maryland, religious liberty exemptions shifted the question for some legislators from *whether* to embrace marriage equality to *how* to balance that good with religious liberty.⁵³

tions only for the clergy. See generally Wilson, *supra* note 49 (discussing same-sex marriage in Connecticut). On Oct. 28, 2008, the Connecticut Supreme Court, in *Kerrigan v. Commissioner of Public Health*, held that "the state's disparate treatment of same sex couples [in excluding them from the institution of marriage] is constitutionally deficient." 957 A.2d 407, 412 (Conn. 2008). With the judiciary's thumb on the scales, legislators then introduced a same-sex marriage bill with substantial protections that ultimately passed in 2009. See Chase Matthews, *Connecticut Gov. Signs Gay Marriage into Law*, CHICAGOPRIDE.COM (Apr. 23, 2009, 12:00 AM), <http://chicago.gopride.com/news/article.cfm/articleid/7272400>.

In Maine, legislation containing a clergy-only exemption attained overwhelming support before being repealed in a popular referendum. See generally Wilson, *supra* note 49 (discussing same-sex marriage in Maine). That bill passed in 2009 by votes of 89–57 and 21–13 in the lower and upper chambers, respectively. See *id.*

Although it is impossible, after the fact, to say definitively that more expansive exemptions proved decisive in the success of these same-sex marriage laws, the number of narrowly defeated bills that later succeeded when revised to include more expansive exemptions is suggestive. Also suggestive is Maine's experience: even where a same-sex marriage bill passed both chambers of the legislature by substantial majorities, the new law containing protection only for the clergy was narrowly rejected by voters. See *id.*

It remains to be seen whether new legislation in Maryland and Washington, containing more expansive exemptions, will satisfy voters in a referendum. In these states, opponents have collected sufficient signatures to force a November 2012 referendum on the legislation. See Berg, *supra* note 50; Myers, *supra* note 50. See generally Wilson, *supra* note 49 (summarizing recent developments in same-sex marriage legislation in Maryland and Washington).

⁵² See Danny Hakim, *Exemptions Were Key to Vote on Gay Marriage*, N.Y. TIMES, June 26, 2011, at A20.

⁵³ See Robin Wilson & Anthony Kreis, *Same-Sex Marriage Symposium: The Overlooked Benefit of Leaving Perry in Place*, SCOTUSBLOG (Sept. 18, 2012, 3:16 PM), <http://www.scotusblog.com/2012/09/same-sex-marriage-symposium-the-overlooked-benefit-of-leaving-perry-in-place/> (quoting Maryland House of Delegates Speaker Michael Busch's statement that "I know for a fact that for two or three delegates [including religious liberty protections] was an important component in their decision to vote for it"); see also John Wagner & Aaron C. Davis, *Governor Unveils Details of His Legislative Agenda*, WASH. POST, Jan. 24, 2012, at B5 (explaining that "[r]eligious-exemption language included in O'Malley's same-sex marriage bill is intended to pick up additional support in the House of Delegates, where a bill fell unexpectedly short last year after clearing the Senate"); Annie Linskey, *After Soul Searching, Swing Votes Make Difference for Same-Sex Marriage*, BALT. SUN (Feb. 18, 2012), http://articles.baltimoresun.com/2012-02-18/news/bs-md-same-sex-sunday-20120217_1_marriage-bill-opponents-of-gay-marriage-vote-count (discussing the passage of same-sex marriage

These successful attempts to recognize same-sex marriage resulted from a delicate process in which legislators reached a set of compromises about how best to balance marriage equality with other goods in society. This should surprise no one. Competing interests are often balanced in a pluralistic, democratic society. In the civil rights era, exemptions for religious objectors and others served as the pathway to social change, not an obstacle to it.⁵⁴

What sparked those compromises? Religious organizations do much good in society but frequently need the space to do so in accordance with their convictions.⁵⁵ In the same-sex marriage context, with-

legislation) (noting that the bill passed with one vote to spare, and that one of the votes in favor of the bill came from a delegate who is a “devoted Methodist [who] was worried about churches that did not want to preform [sic] same-sex marriages”).

⁵⁴ Title VIII of the Civil Rights Act of 1968, prohibiting discrimination based on race, color, religion, or national origin in public accommodations engaged in interstate commerce, contains a provision known as the “Mrs. Murphy exemption,” which exempts dwellings with four or fewer families, if one of them is the owner’s. See 42 U.S.C. 3603(b)(2) (2006). The fictional Mrs. Murphy, an Irish widow engaged in renting rooms in her home, emerged during congressional debate over Title II of the Civil Rights Act of 1964, when lawmakers expressed concern about restricting an individual’s right of commercial association without interfering with his or her deep personal convictions. See Marie A. Failing, *Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords*, 29 CAP. U. L. REV. 383, 383–87 (2001). Many proponents of the exemption feared Title II would not pass without this accommodation, because public empathy for homeowners who are forced to let rooms to support their families would deter lawmakers from enacting an unqualified law. See Peter Evans Kane, *The Senate Debate on the 1964 Civil Rights Act 50* (Aug. 1967) (unpublished Ph.D. dissertation, Purdue University), available at <http://docs.lib.purdue.edu/dissertations/AAI6806320>. Like Title II, Title VIII exempts owner-occupied dwellings with no more than four families, as well as religious organizations operating noncommercial dwellings—accommodations that Senator Walter Mondale at the time labeled as “politically necessary.” 114 CONG. REC. 2495 (1968).

⁵⁵ See BYRON R. JOHNSON, CTR. FOR RESEARCH ON RELIGION & URBAN CIVIL SOC’Y, *OBJECTIVE HOPE: ASSESSING THE EFFECTIVENESS OF FAITH-BASED ORGANIZATIONS: A REVIEW OF THE LITERATURE* 7 (2002), available at http://www.manhattan-institute.org/pdf/crrucs_objective_hope.pdf (noting that “[b]y some estimates, [Faith-Based Organizations] provide \$20 billion of privately contributed funds to social service delivery for over 70 million Americans annually”); AVIS C. VIDAL, URBAN INST., *FAITH-BASED ORGANIZATIONS IN COMMUNITY DEVELOPMENT* (2001), available at <http://www.huduser.org/portal/publications/faithbased.pdf> (noting, in a foreword by U.S. Department of Housing and Urban Development general deputy assistant secretary Lawrence L. Thompson, that “recently, there has been greater recognition and value given to the contributions of faith-based organizations (FBOs) in providing social services,” and that “[h]istorically, FBOs have been particularly prominent in providing food, clothing, and shelter to people in need”); WHITE HOUSE OFFICE OF FAITH-BASED & CMTY. INITIATIVES, *GUIDANCE TO FAITH-BASED AND COMMUNITY ORGANIZATIONS ON PARTNERING WITH THE FEDERAL GOVERNMENT* 1 (n.d.), available at <http://www.ethicsinstitute.com/pdf/Faith%20Based%20Federal%20Grants.pdf> (“Faith-based and community groups are the unsung heroes in helping Americans in need. Their compassionate care and neighborly love turn lives around and provide hope where it has been missing. These groups do not provide care because they have to, but because they want to.”).

out such protections, groups and individuals that hew to their religious beliefs about marriage would be at risk of losing government contracts and benefits and would also be subject to lawsuits from private citizens. These risks are not speculative. The City of San Francisco withdrew \$3.5 million in social services contracts from the Salvation Army when it refused, for religious reasons, to provide benefits to its employees' same-sex partners.⁵⁶ In New Jersey, the state's Division of Civil Rights of the Office of the Attorney General found that a Methodist nonprofit association violated New Jersey's Law Against Discrimination when it denied the requests of two same-sex couples to use the group's boardwalk pavilion for their commitment ceremonies.⁵⁷ Separately, local tax authorities stripped the group of its exemption from ad valorem property taxes on the boardwalk pavilion and billed the group close to \$20,000 in "rollback" taxes, although it ultimately paid less.⁵⁸ More recently, a Vermont bed-and-breakfast settled a suit seeking "symbolic and punitive damages, and declaratory and injunctive relief" brought by a lesbian couple, joined by the Vermont Human Rights Commission.⁵⁹ The cou-

⁵⁶ See Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, S.F. CHRON., July 10, 1998, at A-1.

⁵⁷ See N.J. Att'y Gen., Div. on Civil Rights, Finding of Probable Cause, *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. PN34XB-03008, at 12 (Dec. 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf>. The administrative law judge who heard the case determined that the association "was renting space at the Pavilion for weddings, an activity largely detached from associational expression or speech," had rented "wedding space to heterosexual couples irrespective of their [religious] tradition," and had never "inquire[d] into religious beliefs or practice because it did not sponsor, or otherwise control, these weddings," and thus that the association had violated New Jersey's Law Against Discrimination when it refused to permit the couple's civil union ceremony. See *Bernstein v. Ocean Grove Camp Meeting Ass'n*, No. CRT 6145-09, 2012 WL 169302, at *4-5 (N.J. Office of Admin. Law, Jan. 12, 2012). The federal courts refused to intervene when the association filed suit. See *Ocean Grove Camp Meeting Ass'n of the United Methodist Church v. Vespa-Papaleo*, No. 07-3802-JAP, 2007 WL 3349787, at *6 (D.N.J. Nov. 7, 2007) (granting the defendant's motion to dismiss on abstention grounds), *aff'd in part, remanded in part*, 339 F. App'x 232 (3d Cir. 2009).

⁵⁸ See Barbara Bradley Hagerty, *Gay Rights, Religious Liberties: A Three-Act Story*, NPR (June 16, 2008), <http://www.npr.org/templates/story/story.php?storyId=91486340>; see also Judy Peet, *Gay Unions Dispute Could Cost Group: State Pulls Association's Tax-Exempt Status*, STAR-LEDGER (Newark, N.J.), Sept. 18, 2007, at 19 (indicating that taxes on the pavilion would be roughly \$11,000 as a result of the property's loss of exemption under New Jersey's Green Acres Program, which requires that the property "be available equally to all persons"). Under the Green Acres Program, the tax exemption requires that covered property "is open to all on an equal basis and that a tax exemption . . . would be in the public interest." See Letter from Lisa Jackson, Comm'r, N.J. Dep't of Env'tl. Prot., to Scott Hoffman, Adm'r, Ocean Grove Camp Meeting Ass'n (Sept. 15, 2007) (on file with author).

⁵⁹ See Third Amended Complaint at 1, *Baker v. Wildflower Inn*, No. 183-7-11 CACV (Vt. Super. Ct. Mar. 5, 2012), available at http://www.aclu.org/files/assets/wildflower_third_amended_complaint.pdf (providing the plaintiffs' allegations and claims for relief).

ple filed suit after an employee indicated in an e-mail that the inn does not “host gay receptions” due to the innkeepers’ “personal feelings,”⁶⁰ although it remains disputed whether the employee’s statement did, in fact, represent the inn’s policy.⁶¹ Nonetheless, the inn agreed to pay a \$10,000 civil penalty, place another \$20,000 in a charitable trust, and no longer host weddings or receptions for any member of the public.⁶²

The jurisdictions that have recognized same-sex marriage legislatively have all acknowledged the impact of same-sex marriage laws on a wide swath of the public that adheres to a traditional (i.e., heterosexual) view of marriage.⁶³ Each law provides religious liberty protections to the clergy⁶⁴ in addition to guarantees extending beyond those

⁶⁰ See Answer and Affirmative Defenses to Plaintiffs’ Third Amended Complaint at Exhibit A, *Wildflower Inn*, No. 183-7-11 CACV (Vt. Super. Ct. May 10, 2012), available at http://www.aclu.org/files/assets/wildflower_answer_and_affirmative_defenses_to_plfs_third_amended_complaint.pdf [hereinafter Answer and Affirmative Defenses] (containing a printed copy of the e-mail from the inn’s employee). The couple alleged that the innkeepers had made public statements that they could not offer their services “because it goes against everything that we as Catholics believe in.” Third Amended Complaint, *supra* note 59, at 6.

⁶¹ Compare Third Amended Complaint, *supra* note 59, at 6 (alleging that the owners of the inn reaffirmed that hosting same-sex weddings contradicted their religious beliefs), with Answer and Affirmative Defenses, *supra* note 60, at 4 (denying this assertion as inaccurate, and claiming that the employee who denied services did not follow the inn’s policy). Significantly, the employee offered the services of her own private company in the same e-mail, to which the mother of one of the plaintiffs responded that “[they] will have no shortage of good choices.” See Third Amended Complaint, *supra* note 59, at Exhibit A. As explained in Part V, the possibility of a hardship to the couple should influence society’s willingness to provide an exemption. See *infra* notes 247–288 and accompanying text.

⁶² See *Vermont Inn, 2 Women Settle Gay Marriage Lawsuit*, WALL ST. J., Aug. 23, 2012, <http://online.wsj.com/article/AP59a61574cce14b349a527456541a0c7c.html> (reporting the terms of the settlement). The inn did not qualify for the statutory exemption contained in Vermont’s same-sex marriage law for religious organizations and associated nonprofits that refuse, for religious reasons, to provide services “related to the solemnization of a marriage or celebration of a marriage.” See VT. STAT. ANN. tit. 9, § 4502(*h*) (Supp. 2011).

⁶³ See generally Wilson, *supra* note 49 (providing more detail on the laws enacted in Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington).

⁶⁴ Clergy protections appear in each of the laws offering more expansive protections. For instance, Vermont’s same-sex marriage law provides that it “does not require a member of the clergy authorized to solemnize a marriage . . . to solemnize any marriage, and any refusal to do so shall not create any civil claim or cause of action.” VT. STAT. ANN. tit. 18, § 5144(*b*) (Supp. 2011). See generally Wilson, *supra* note 49 (providing the text of enacted legislation and a breakdown of protections in proposed and enacted bills). The idea of “forced officiating” is “a distraction from real situations where religious conscience [may be] at risk.” See Letter from Robin Fretwell Wilson et al. to Iowa Governor Chet Culver (July 9, 2009) (on file with author).

Some proposed exemptions that insulate only the clergy and churches from the duty to solemnize same-sex marriages have failed to garner enough support to become law. See *infra* notes 78–79 and accompanying text.

granted by the First Amendment.⁶⁵ A core of protections has emerged for religious organizations⁶⁶ and individuals⁶⁷ who cannot celebrate or facilitate *any* marriage—including a same-sex marriage, interfaith marriage, or second marriage—when doing so would violate their religious convictions.⁶⁸

Although each law describes the exempt activities in slightly different terms, generally they encompass the provision of “services, accommodations, advantages, facilities, goods, or privileges to an individual if . . . related to the solemnization of a marriage or celebration of a marriage.”⁶⁹ Each jurisdiction insulates religious organizations from civil

⁶⁵ See *supra* notes 14–15 (discussing *Smith*, 494 U.S. at 890, and reviewing the Court’s conclusion that neutral and generally applicable laws do not violate the First Amendment regardless of their burden on the exercise of religious liberty).

⁶⁶ See, e.g., CONN. GEN. STAT. ANN. § 46b-35a (West Supp. 2011) (covering “a religious organization, association or society, or any nonprofit institution or organization operated, supervised or controlled by or in conjunction with a religious organization, association or society”); D.C. CODE § 46-406(e)(1) (LexisNexis 2011) (covering “a religious society, or a nonprofit organization that is operated, supervised, or controlled by or in conjunction with a religious society”); N.H. REV. STAT. ANN. § 457:37(III) (Supp. 2011) (covering “a religious organization, association, or society, or any individual who is managed, directed, or supervised by or in conjunction with a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society”); N.Y. DOM. REL. LAW § 10-b(1) (McKinney 2011) (covering “a religious entity . . . or a corporation incorporated under the benevolent orders law . . . or a not-for-profit corporation operated, supervised, or controlled by a religious corporation, or any employee thereof, being managed, directed, or supervised by or in conjunction with a religious corporation, benevolent order, or a not-for-profit corporation”); VT. STAT. ANN. tit. 9 § 4502(f) (covering “a religious organization, association, or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society”).

⁶⁷ See *supra* note 14 (discussing state RFRAs).

⁶⁸ These religious exemptions encompass “all” marriages, including interfaith marriages, second marriages, and same-sex marriages. See, e.g., N.H. REV. STAT. ANN. § 457:37(III) (noting that religious organizations “*shall not be required* to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if such request for such services, accommodations, advantages, facilities, goods, or privileges is related to the solemnization of a marriage, the celebration of a marriage, or the promotion of marriage”) (emphasis added); N.Y. DOM. REL. LAW § 10-b (noting that religious organizations “*shall not be required* to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage”) (emphasis added); see also *infra* app. A (providing other statutory examples). Some faiths oppose interfaith marriage. See Cent. Conference of Am. Rabbis, *Reform Judaism and Mixed Marriage* (Responsa No. 146), reprinted in AMERICAN REFORM RESPONSES: COLLECTED RESPONSES OF THE CENTRAL CONFERENCE OF AMERICAN RABBIS 1889–1983, at 445 (Walter Jacob ed., 1983) (“The Central Conference of American Rabbis, recalling its stand adopted in 1909 ‘that mixed marriage is contrary to the Jewish tradition and should be discouraged,’ now declares its opposition to participation by its members in any ceremony which solemnizes a mixed marriage.”).

⁶⁹ See, e.g., VT. STAT. ANN. tit. 9 § 4502(f). New Hampshire also requires that “such solemnization, celebration, or promotion of marriage is in violation of [the objector’s] reli-

suits for refusing to celebrate marriages,⁷⁰ and six of the seven explicitly protect such organizations from punishment at the hands of the government.⁷¹ All insulate religious nonprofit organizations, like Catholic Charities or the Salvation Army, from the duty to celebrate or solemnize marriages that violate their religious tenets.⁷² Four extend these protections to benevolent religious organizations, like the Knights of Columbus, or to religious groups that sponsor marriage retreats or provide housing for married individuals.⁷³ In New York, New Hampshire,

gious beliefs and faith." N.H. REV. STAT. ANN. § 457:37(III). *See generally* Wilson, *supra* note 49 (providing the text of each law).

⁷⁰ *E.g.*, VT. STAT. ANN. tit. 9 § 4502(h) ("Any refusal to provide services, accommodations, advantages, facilities, goods, or privileges in accordance with this subsection shall not create any civil claim or cause of action."); *see* CONN. GEN. STAT. ANN. § 46b-35a (using similar language); D.C. CODE § 46-406(e)(1); N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(2). *See generally* Wilson, *supra* note 49 (providing more detail on these statutes).

⁷¹ *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-35a; D.C. CODE § 46-406(e)(2); N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1). Vermont provides an exemption without specifying more. *See* VT. STAT. ANN. tit. 9 § 4502(h).

⁷² *See supra* note 66 (providing the text of relevant statutes).

⁷³ Three states expressly allow benevolent organizations to limit membership or insurance benefits to spouses in traditional marriages. *See* N.H. REV. STAT. ANN. § 457:37(IV) (Supp. 2011); VT. STAT. ANN. tit. 9 § 4501(b) (Supp. 2011); H.B. 438, 2012 Leg., 43d Sess. (Md. 2012). A fourth, New York, includes "a corporation incorporated under the benevolent orders law" in its general exemption. *See* N.Y. DOM. REL. LAW § 10-b(1) (McKinney Supp. 2012). *See generally* Wilson, *supra* note 49 (providing more detail on these statutes).

As to religious counseling programs, three jurisdictions—the District of Columbia, Maryland, and New Hampshire—expressly protect religious organizations from the promotion of marriage through religious counseling programs and retreats. *See* D.C. CODE § 46-406(e)(1) (LexisNexis Supp. 2011) (noting that religious societies "shall not be required to provide services, accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a marriage, or the promotion of marriage through religious programs, counseling, courses, or retreats, that is in violation of the religious society's beliefs"); N.H. REV. STAT. ANN. § 457:37(III) (exempting certain organizations from providing services if "the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals, and such solemnization, celebration, or promotion of marriage is in violation of his or her religious beliefs and faith"); H.B. 430, 2012 Leg., 430th Sess. (Md. 2012) (noting that religious organizations "may not be required to provide services, accommodations, advantages, facilities, goods, or privileges to an individual if the request . . . is related to . . . the promotion of marriage through any social or religious programs or services, in violation of the entity's religious beliefs"). New York's exemption may provide protection as well:

[N]othing in this article shall limit or diminish the right . . . of any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization . . . from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.

See N.Y. DOM. REL. LAW § 10-b(2).

and Washington, individual employees of these groups receive protection, too.⁷⁴ Although no state legislature has yet to protect religious objectors in the for-profit sector or in government employment,⁷⁵ the religious liberty protections enacted to date sweep far beyond the church sanctuary, providing accommodations that exceed what most scholars believe would be constitutionally demanded.⁷⁶ Importantly, however, the legislative accommodations in some states were cobbled together quickly during the legislative process, resulting in some drafting problems.⁷⁷

Contrast these legislative victories with the resounding defeats that have occurred when advocates have adopted an inflexible approach to religious accommodations. Since 2004, legislators in nine states and the District of Columbia have introduced proposed same-sex marriage legislation shorn of protections for anyone other than the clergy and churches.⁷⁸ This legislation has failed in every jurisdiction in which it has been offered.⁷⁹

⁷⁴ N.Y. DOM. REL. LAW § 10-b(1) (“[A]ny employee . . . being managed, directed, or supervised by . . . a religious corporation, benevolent order, or a not-for-profit corporation . . . shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage. Any such refusal . . . shall not create any civil claim . . .”); N.H. REV. STAT. ANN. § 457:37(III) (“[A]ny individual . . .”); WASH. REV. CODE ANN. § 26.04.010(2)(4) (West 2005) (“[A]n individual . . .”). These provisions immunize employees of religious organizations from civil suit directly and possibly also from being compelled by their employers to participate in marriage celebrations. Other states do not provide explicit exemptions for individual employees of religious organizations. See *infra* app. A.

⁷⁵ The religious liberty accommodations that I and others have worked to secure, however, would *not* allow religious individuals in government employment or commerce to serve as roadblocks on the path to marriage; on the contrary, they would only allow these individuals to step aside from facilitating a marriage when doing so would violate their sincerely held religious beliefs, but *only* when substantial hardship for same-sex couples would not result. See *infra* app. B.

⁷⁶ See *Smith*, 494 U.S. at 890.

⁷⁷ See, e.g., *infra* notes 131–133 and accompanying text (discussing the suggestion to limit the application of the model provision in Appendix B to sincerely held religious beliefs).

⁷⁸ See generally Wilson, *supra* note 49 (providing a summary of key provisions in selected states’ same-sex marriage legislation).

⁷⁹ See generally *id.* (reviewing various protections and exemptions considered by state legislators in drafting same-sex marriage bills). This is not to say that all same-sex marriage bills that include more expansive exemptions succeed. For example, Maryland’s proposed legislation in 2011 included a clergy-only exemption. The legislation was amended by the Senate to include more expansive exemptions, only to die in the House because the Senate’s provisions were effectively frozen—no further changes could be made by the House in time to be heard by the Senate in that legislative cycle. See *id.*

Such measures have failed at the ballot box, too. In 2009, Maine legislators repeatedly refused to include expansive religious liberty protections in the state's same-sex marriage law.⁸⁰ Instead, the legislature elected to provide only "faux" protections already guaranteed by the Constitution and turned down more expansive religious liberty protections like those advocated for by some scholars.⁸¹ Maine voters turned back the law in a "people's veto" by a relatively narrow margin: 52.9% to 47.1%.⁸² The inflexible, winner-takes-all character⁸³ of the Maine statute naturally elicited the question raised by Professor Dale Carpenter the next morning: would "includ[ing] broader protection for religious liberty in the legislature's [same-sex marriage] bill" have made a difference?⁸⁴ Arguably it would have—after all, if a mere 2.9% of voters

⁸⁰ See Robin Fretwell Wilson, *A Winner-Takes-All Approach to State Same-Sex Marriage Laws Is Self-Defeating*, SCOTUSBLOG (Aug. 29, 2011, 4:16 PM), <http://www.scotusblog.com/2011/08/a-winner-takes-all-approach-to-state-same-sex-marriage-laws-is-self-defeating>.

⁸¹ Maine's same-sex marriage law provided "protection" that was coterminous with constitutional guarantees. It expressly did not "authorize any court or other state or local governmental body . . . to compel, prevent or interfere in any way with any religious institution's religious doctrine, policy, teaching or solemnization of marriage within that particular religious faith's tradition as guaranteed by the Maine [or] United States Constitution[s]." An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, 2009 Me. Laws 150–51 (abrogated by people's veto). It provided no other protections. See *id.* Provisions like these offer "faux" protection because "[n]o one seriously believes that clerk will be forced, or even asked, to perform marriages that are anathema to them." See Marc D. Stern, *Same-Sex Marriage and the Churches*, in EMERGING CONFLICTS, *supra* note 30, at 1.

⁸² In response to Question 1: People's Veto, An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, 52.9% of Maine voters responded "Yes" when asked, "Do you want to reject the new law that lets same-sex couples marry and allows individuals and religious groups to refuse to perform these marriages?" compared to 47.1% who responded "No." See Dep't of the Sec'y of State, *November 3, 2009 General Election Tabulations*, MAINE.GOV, <http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html> (last visited Sept. 17, 2012).

⁸³ Professor Jana Singer argues for winner-takes-all legislation stripped of any religious accommodations. See Jana Singer, *Balancing Away Marriage Equality*, SCOTUSBLOG (Aug. 29, 2011, 1:00 PM), <http://www.scotusblog.com/2011/08/balancing-away-marriage-equality>. She suggests that "broad-based exemptions are both constitutionally problematic and politically unwise." *Id.* If Professor Singer's over-accommodation argument were correct, thousands of state and federal religious statutory accommodations would be invalidated—from military conscientious objection provisions to Native American peyote use, which received statutory exemption in response to *Smith*. See *Smith*, 494 U.S. at 890. See generally Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2010) (discussing the extent of existing religious liberty accommodations).

⁸⁴ Dale Carpenter, *There's Always Next Year*, VOLOKH CONSPIRACY (Nov. 4, 2009, 1:21 PM), <http://www.volokh.com/2009/11/04/theres-always-next-year> ("Some will say that we should have included broader protection for religious liberty in the [Maine] legislature's [same-sex marriage] bill."). Professor Carpenter did not attribute the law's demise to this omission, however: "I don't get the sense that the supposed erosion of religious liberty was the main Maine issue or that broader protection would have made an electoral differ-

could have been swayed to change their votes by live-and-let-live religious liberty protections, Maine would have same-sex marriage today.⁸⁵ Together, these experiences suggest that exemptions take a powerful argument against same-sex marriage away from opponents.⁸⁶

As with the legislative process, religious liberty accommodations can mute a powerful argument used in constitutional amendment fights. Sadly, this did not occur in California with Proposition 8. There,

the Yes on 8 campaign . . . [argued that] religious institutions would be in danger of losing their tax exempt status or being sued if they refused to perform same sex marriages or to allow the use of their properties for that purpose. Religiously affiliated adoption agencies would be sanctioned if they refused to allow same sex couples to adopt and religious parents would be harmed when public schools taught that same sex marriages were as legitimate as heterosexual marriages.⁸⁷

ence. . . . Instead, the central concern seems to have been what will be taught in public schools to children being raised by heterosexual parents." *Id.* Others chalk up the demise of Maine's same-sex marriage law to the vitriol in the referendum. See Jeff Jacoby, *Wedded to Vitriol, Backers of Gay Marriage Stumble*, BOS. GLOBE, Nov. 11, 2009, at A11.

⁸⁵ The strength of preference matters, of course. A voter could tend to favor religious liberty over gay rights, but not know how to weigh or evaluate evidence of a religious liberty impact. If a voter's preference or weighting is not strong enough to change his or her vote or position, then it is irrelevant. Certainly the fact that same-sex marriage opponents in Maine and California invested money in messaging about religious impacts in order to influence the outcome of referenda suggests that they think it mattered. See Bruce E. Boyden, *Constitutional Safety Valve: The Privileges or Immunities Clause and Status Regimes in a Federalist System*, 62 ALA. L. REV. 111, 167 n.292 (2010) ("Opponents of same-sex marriage in Maine [invested in] advertisements claiming that if same-sex marriage became legal, homosexuality would be taught in schools."); Patricia A. Cain, *Contextualizing Varnum v. Brien: A "Moment" in History*, 13 J. GENDER RACE & JUST. 27, 48 (2009) ("The first advertisement that opponents of same-sex marriage launched was one that said same-sex marriage threatened to take away the tax-exempt status of California churches."). The real assay of whether religious liberty concerns move undecided citizens will come in the 2012 referenda on the Maryland and Washington bills containing more expansive religious liberty protection. See *supra* note 50.

⁸⁶ Other factors may explain this legislative track record. For example, Rhode Island's 2011 same-sex marriage bill contained a clergy-only exemption. See generally Wilson, *supra* note 49 (summarizing the key provisions of Rhode Island's proposed same-sex marriage legislation). However, given the fact that Rhode Island is the most Catholic state in the nation, the same-sex marriage bill may have failed to garner sufficient support, whatever exemptions were proffered. See *Religious Identity: States Differ Widely*, GALLUP (Aug 7, 2009), <http://www.gallup.com/poll/122075/religious-identity-states-differ-widely.aspx> (reporting that 53% of Rhode Islanders identify as Roman Catholic). Nonetheless, the pattern strongly correlates with the refusal to embrace more expansive exemptions.

⁸⁷ Helene Slessarev-Jamir, *Religious Conservatives' Success in Constructing Gay Marriage as a Threat to Religious Liberties* 3 (Am. Political Sci. Ass'n 2012 Annual Meeting Paper), avail-

These arguments received traction precisely because no legislation was enacted on the heels of the California Supreme Court's 2008 decision in *In re Marriage Cases*.⁸⁸ The California legislature missed a crucial opportunity to balance religious liberty concerns with marriage equality, as Connecticut's legislature did after Connecticut's supreme court held in *Kerrigan v. Commissioner of Public Health* that laws limiting marriage to opposite-sex couples violated same-sex couples' equal protection rights under Connecticut's Constitution.⁸⁹

As each of these examples illustrates, religious accommodations need not work against the marriage-equality agenda. As one prominent gay rights leader, Jonathan Rauch, has pointed out, the smart move is to "bend toward accommodation," not away from it.⁹⁰

B. *Religious Accommodations Can Cement Greater Access to Needed Services*

Just as an inflexible, winner-takes-all stance may backfire in the same-sex marriage context, it may also backfire with the coverage mandate. This is so not because a legislative victory hangs in the balance—

able at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107976; see California Marriage Act.

⁸⁸ See *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008) (concluding that "to the extent the current California statutory provisions limit marriage to opposite-sex couples, these statutes are unconstitutional"), *superseded by constitutional amendment*, California Marriage Protection Act, CAL. CONST. art. I, § 7.5 (2008). The U.S. Court of Appeals for the Ninth Circuit subsequently held that Proposition 8 violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Perry v. Brown*, 671 F.3d 1052, 1095 (9th Cir. 2012), *petition for cert. filed sub nom. Hollingsworth v. Perry*, 81 U.S.L.W. 3075 (U.S. July 30, 2012) (No. 12-144).

⁸⁹ See 957 A.2d 407, 482 (Conn. 2008); *supra* note 51 (discussing the genesis of Connecticut's legislation). Religious liberty protections may also impact challenges to same-sex marriage bans. See Anthony Michael Kreis, *Gay Gentrification: Whitewashed Fictions of LGBT Privilege and the New Interest-Convergence Dilemma*, (unpublished manuscript) (on file with author) ("The current policy debates in states enacting marriage equality will help sustain sexual minority's claims to a fundamental right to marry. The statutory schemes enacted are indispensable evidence for judges that the interests of the LGBT community do not undermine the rights of religious institutions, religious social service groups, or other fraternal organizations.").

⁹⁰ Jonathan Rauch, *Majority Report*, *ADVOCATE*, Dec. 2010–Jan. 2011, at 24–27. Rauch argues for gay marriage advocates to adopt a two-pronged shift in strategy:

First, accept legal exceptions that let religious organizations discriminate against gays whenever their doing so imposes a cost we can live with. Second, dial back the accusations of 'bigot' and 'hater'. . . . Not every religious accommodation is valid, and it's not always clear where to draw all the lines. But the smart approach is to bend toward accommodation, not away from it, whenever we can live with the costs.

Id.

the ACA has already been enacted, although Congress is now considering a number of bills to limit the coverage mandate⁹¹— but because religious objectors, when left no choice on other matters, have often chosen to exit the market rather than violate their religious beliefs.⁹²

Such exoduses have occurred again and again over the past decade. In 2006, Catholic Charities of Massachusetts shuttered its adoption business after placing children with Boston families for 103 years.⁹³ In the months preceding the closure, the state's bishops learned that the organization had placed children for adoption with a handful of gay and lesbian parents—placements that accorded with Massachusetts law prohibiting discrimination on the basis of sexual orientation.⁹⁴ Still, the state's bishops abruptly discontinued the practice.⁹⁵ The bishops then sought "relief from the regulatory requirements," asking then-Governor

⁹¹ Efforts have begun in Congress to broaden the exemption or eliminate the coverage mandate. Laurie Kellman, *GOP Senators Fail to Reverse Birth Control Rule*, BOS. GLOBE (Mar. 1, 2012), http://www.boston.com/business/articles/2012/03/01/gop_senators_fail_to_reverse_birth_control_rule.

⁹² See Epstein & Hyman, *supra* note 25, at 4 (stating that religious organizations may choose to leave the health care market and arguing that "[w]hatever one thinks of the moral questions involved, this controversy . . . is also sure to impose additional pressures on the [ACA]").

⁹³ Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOS. GLOBE, Mar. 11, 2006, at A1.

⁹⁴ See 102 MASS. CODE REGS. 1.03(1) (1997) (requiring adoption agencies to obtain a state license and "not discriminate in providing services to children and their families on the basis of race, religion, cultural heritage, political beliefs, national origin, marital status, sexual orientation or disability") (emphasis added). This requirement dates back to 1989, "when Massachusetts amended its antidiscrimination statute dealing with employment, housing, and government services to include sexual orientation as one of the forbidden grounds of discrimination." Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 832 n.301 (2007).

⁹⁵ Catholic Charities originally placed thirteen children with gay or lesbian parents, although it is unclear whether the adopting parents were at the time in same-sex relationships. Compare Wen, *supra* note 93 (noting that "approximately 13 children had been placed by Catholic Charities in gay households" (emphasis added)), with Jerry Filteau, *Catholic Charities in Boston Archdiocese to End Adoption Services*, CATHOLIC NEWS SERV. (Mar. 13, 2006), <http://www.catholicnews.com/data/stories/cns/0601456.htm> (indicating that Catholic Charities "had arranged the adoption of 13 children by same-sex couples over the past 20 years" (emphasis added)). After reports surfaced regarding the organization's placements, the state's bishops directed Catholic agencies not to place children with gay or lesbian parents. Wen, *supra* note 93. Eight members of Catholic Charities' forty-two member board, which had voted unanimously to continue placing children with lesbian and gay parents, then resigned. Patricia Wen, *In Break from Romney, Healey Raps Gay Adoption Exclusion*, BOS. GLOBE, Mar. 3, 2006, at B4.

Mitt Romney for assistance.⁹⁶ Governor Romney initially signaled “openness” to the request, but ultimately said that any exemption would have to come from the legislature or a court.⁹⁷ When relief was not forthcoming, however, Catholic Charities discontinued its adoption services altogether.⁹⁸

In February 2010, the Catholic Archdiocese of Washington ended its eighty-year-old foster care placement program rather than approve same-sex couples for placement, which presumably would have been required under the District of Columbia’s nondiscrimination laws and its new same-sex marriage law.⁹⁹ Recently, Illinois’s same-sex civil union law ushered in a new requirement that all social service agencies that receive state money, including religiously affiliated ones, “must consider same-sex couples as potential foster-care and adoptive parents.”¹⁰⁰ The state’s Catholic bishops lobbied against the civil union law, but contended that they and other religious leaders were given the impression that it would not affect state contracts with Catholic Charities and other religious social services.¹⁰¹ Finding themselves without an exemption, many groups are shedding their adoption services, closing them, or transferring them outside the church *qua* church to nonprofit organizations.¹⁰²

⁹⁶ See Statement of the Mass. Catholic Conference on Behalf of Archbishop Sean P. O’Malley et al. (Feb. 28, 2006), *available at* http://www.bostoncatholic.org/uploadedFiles/News_releases_2006_statement060228.pdf.

⁹⁷ See Patricia Wen, *Bishops Dealt Setback in Pursuit of Gay Adoption Exemption*, BOS. GLOBE, Feb. 17, 2006, at B3; Patricia Wen & Frank Phillips, *Romney Shifts on Adoption by Gays*, BOS. GLOBE, Mar. 1, 2006, at B1.

⁹⁸ See Wen, *supra* note 93; see also Robin Fretwell Wilson, *A Matter of Conviction: Moral Clashes over Same-Sex Adoption*, 22 BYU J. PUB. L. 475, 479–83 (2008) (documenting the exit of religious social services providers and other vendors from the market in the absence of an exemption).

⁹⁹ See Michelle Boorstein, *Catholic Archdiocese Ends D.C. Foster-Care Program*, WASH. POST, Feb. 17, 2010, at B1; Emily Esfahani Smith, *Washington, Gay Marriage and the Catholic Church*, WALL ST. J., Jan. 9, 2010, at A11.

¹⁰⁰ See Laurie Goodstein, *Illinois Bishops Drop Program over Bias Rule*, N.Y. TIMES, Dec. 29, 2011, at A16.

¹⁰¹ Explaining why the Catholic dioceses did not lobby for a specific exemption, Bishop Thomas J. Paprocki said, “It would have been seen as, ‘We’re going to compromise on the principle as long as we get our exception.’ We didn’t want it to be seen as buying our support.” See *id.* Notably, Connecticut and Maryland’s same-sex marriage laws exempt social services agencies so long as they receive no government funding. CONN. GEN. STAT. § 46b-135b; H.B. 438, 2012 Leg., 430th Sess. (Md. 2012).

¹⁰² See Goodstein, *supra* note 100 (describing the process by which Illinois bishops “followed colleagues in Washington, D.C., and Massachusetts who had jettisoned their adoption services rather than comply with nondiscrimination laws”); William Wan, *Catholic Charities to Limit Health Benefits to Spouses*, WASH. POST, Mar. 2, 2010, at A1 (reporting that “Catholic Charities last month transferred its foster-care program—43 children, 35 families

The coverage mandate likewise may hasten such extreme measures. Chicago's Cardinal Francis George asked in a recent op-ed:

What will happen if the HHS regulations are not rescinded? A Catholic institution, so far as I can see right now, will have one of four choices: 1) secularize itself, breaking its connection to the church, her moral and social teachings and the oversight of its ministry by the local bishop. This is a form of theft. It means the church will not be permitted to have an institutional voice in public life. 2) Pay exorbitant annual fines to avoid paying for insurance policies that cover abortifacient drugs, artificial contraception and sterilization. This is not economically sustainable. 3) Sell the institution to a non-Catholic group or to a local government. 4) Close down.¹⁰³

Cardinal George then noted that the Archdiocese's directory contained "a complete list of Catholic hospitals and health care institutions in Cook and Lake counties," and ominously warned that "two Lents from now, unless something changes, that page will be blank."¹⁰⁴

Other religious leaders have issued similar warnings. The president of Belmont Abbey College, a Catholic-affiliated institution in North Carolina that has filed suit against HHS, told the *Gaston Gazette* that "[w]e want to serve our community but we feel cornered. . . . I believe we would go there [and close the college]" rather than comply with the coverage mandate.¹⁰⁵

Of course, dire predictions may turn out to be nothing more than empty threats. The amount of weight decisionmakers should give to the possibility of an exodus of religious providers will necessarily depend on

and seven staff members—to another provider, the National Center for Children and Families").

¹⁰³ Francis Cardinal George, *What Are You Going to Give Up This Lent?*, CATHOLIC NEW WORLD (Feb. 26, 2012), available at <http://www.catholicnewworld.com/cnwonline/2012/0226/cardinal.aspx>. Cardinal George went on to say that the Church:

would love to have the separation between church and state we thought we enjoyed just a few months ago, when we were free to run Catholic institutions in conformity with the demands of the Catholic faith, when the government couldn't tell us which of our ministries are Catholic and which not, when the law protected rather than crushed conscience.

Id.

¹⁰⁴ See *id.*

¹⁰⁵ See Amanda Memrick, *Belmont Abbey Officials Explain Health Care Lawsuit*, GASTON GAZETTE (Gastonia, N.C.), Nov. 20, 2011, at 1B; see also CAMPUS NOTES, *supra* note 20 (discussing the difficulties faced by Catholic colleges if they are forced to provide contraceptive coverage to students).

the specific context. For example, with health care services, legislators and policymakers wisely would consider a range of factors, including market concentration, the scarcity of other providers, the market share of the possible exiting organizations, the likelihood that the exiting organizations would sell the organization rather than shutter it, the likelihood of a private buyer or the government acquiring the facility in advance of any shutdown, the probable time frame for any transition, and how likely it might be that the objector will choose to accede to civil strictures rather than actually exiting the market.¹⁰⁶ Catholic-affiliated hospitals account for seventeen percent of all hospital admissions nationally,¹⁰⁷ and with many markets served exclusively by a sole, Catholic-affiliated hospital,¹⁰⁸ policymakers may well be loathe to engage in a high-stakes game of chicken.¹⁰⁹

II. SECOND STICKING POINT: EXEMPTIONS CONDONE PREJUDICE OR CRAZY IDEAS

In the same-sex marriage context, legislators readily accept that “member[s] of the cloth . . . clearly ha[ve] deeply held fundamental religious beliefs,” but sometimes express deep skepticism about wheth-

¹⁰⁶ With adoption services, legislators considering a religious exemption might consider a variety of factors, such as the impact an exemption (or denial of one) would have on children awaiting adoption and on same-sex couples seeking to adopt. Among other questions, legislators should also ask whether other providers of adoption services would readily serve gay couples seeking to adopt, whether information-forcing rules could direct prospective parents to willing providers, and, if the state rejects religious accommodations, whether objecting agencies would exit the market, and if so, how many children would they have placed and how many of these children would be picked up by other agencies after their exit. See Wilson, *supra* note 98, at 479–83.

¹⁰⁷ Rachel Benson Gold, *Advocates Work to Preserve Reproductive Health Care Access When Hospitals Merge*, GUTTMACHER REP. ON PUB. POL’Y, Apr. 2000, at 3, 3, available at <http://www.guttmacher.org/pubs/tgr/03/2/gr030203.pdf>.

¹⁰⁸ See Reed Abelson, *Catholic Gains in Health Care Includes Strings*, N.Y. TIMES, Feb. 21, 2012, at A1. See generally LIZ BUCAR, CATHOLICS FOR A FREE CHOICE, CAUTION: CATHOLIC HEALTH RESTRICTIONS MAY BE HAZARDOUS TO YOUR HEALTH (1999), available at <http://www.catholicsforchoice.org/topics/healthcare/documents/1998cautioncatholichealthrestrictions.pdf> (listing counties throughout the United States that, as of 1999, were served solely by Catholic hospitals).

¹⁰⁹ Of course, under the hardship accommodation described in Part V of this Article, the Catholic hospital that exclusively serves its market is likely to be in a blocking position in some instances, and thus would have to provide the needed service, notwithstanding its religious objection. Importantly, the model provision in Appendix B does not limit the ability of religious organizations to object only when no hardship results, a point over which the groups of scholars I have worked with remains deeply divided. See *infra* notes 249–258 and accompanying text (describing instances in which a religiously affiliated hospital would occupy a blocking position, warranting qualification of any exemption).

er other objectors are “really acting on fundamental religious belief and doctrine as opposed to just a prejudice. . . . How do I make that distinction with [a wedding] photographer?”¹¹⁰ A related concern arises in the health care context, where some argue that religious liberty accommodations legitimize scientifically unfounded ideas, such as the notion that emergency contraceptives act as abortifacients.¹¹¹

This Part first takes up the claim that insincere objections will receive protection as a result of religious liberty accommodations. It then examines whether such accommodations validate completely groundless notions.

A. *Concerns About Insincere Beliefs*

Consider first concerns about sincerity. Whether a claimed belief is sincere or a convenient screen for ignoble acts is an issue common to many, but not all, religious freedom protections. Unlike freedom of speech, freedom of conscience does not protect the insincere.

Patently, some individuals may be motivated to make a religious freedom argument in order to receive better work hours, get away with using illegal drugs, or avoid criminal charges.¹¹² Many claims for protection, however, seek the ability to perform an act that is not only personally burdensome, but meaningless apart from the religious faith that gives the act meaning. So, for example, claims to go without medical care¹¹³ or to adhere to kosher dietary laws¹¹⁴ burden the claimant sig-

¹¹⁰ *E.g.*, *Hearing on D.C.’s Same-Sex Marriage Bill*, *supra* note 40, at 6:54:40 (statement of Councilmember Phil Mendelson).

¹¹¹ *See infra* notes 134–156 and accompanying text (discussing the operation of *ella* and Plan B).

¹¹² *E.g.*, *Frazee v. Ill. Dep’t Emp’t Sec.*, 489 U.S. 829, 834–35 (1989) (allowing a religious objection to working on Sundays, even though other members of defendant’s religion did not share this belief); *United States v. Kuch*, 288 F. Supp. 429, 445 (D.D.C. 1968) (attempting to avoid prosecution for drug use by arguing that marijuana was a sacrament in the defendant’s religion, the “Boo Hoos”); *see* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1189–90 (3d ed. 2006); Kent Greenawalt, *Religious Toleration and Claims of Conscience*, (forthcoming 2012) (manuscript at 25) (on file with author) (“[I]f the claim for an exemption is not to work on Saturday, or to refrain from having a child vaccinated, we can imagine that someone who wishes to spend the day with his family, or to avoid vaccination risks for his child, might announce an insincere objection in conscience.”).

¹¹³ *See, e.g.*, *Cruzan v. Miss. Dep’t of Health*, 497 U.S. 261, 265–69 (1990); *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 128–30 (N.Y. 1914), *abrogated by* *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957). Of course, some religious believers assert claims of faith not to avoid health care for themselves, but to avoid some forms of health care for their children. *See generally* UNDERSTANDING FAMILY LAW § 7.05, at 212–15 (John De Witt et al. eds., 3d ed. 2005). These protections have been criticized on a number of grounds. *See* James Dwyer,

nificantly, but impose very little cost on others, making it very unlikely that someone would make an insincere claim.¹¹⁵

Other claims for protection encompass acts that may impose a cost on others, but that nonetheless open the claimant up to significant personal costs. Consider the nurse at Mt. Sinai Hospital who alleged that she was coerced into assisting with a late-term, twenty-two-week abortion, despite federal and state statutes giving her an unqualified right to refuse.¹¹⁶ She was threatened not only with termination, but with losing her nursing license for “patient abandonment.”¹¹⁷

Individuals who object on religious grounds to facilitating same-sex marriages have also incurred significant wrath in the marketplace, suggesting that an objector would not lightly feign an objection. When a New Jersey bridal salon refused to assist a woman with a bridal gown for her same-sex marriage, the story went “viral,” soon gracing not just the pages of a local newspaper, but national media outlets as well. ABC News, the *Los Angeles Times*, *Time Magazine*, and Reuters all covered the story.¹¹⁸ As others have noted,

[i]f an exemption, say from participating in the sale of morning after pills, confers no ordinary advantage on the person who claims that participation would violate his conscience, and if the seeking of an exemption is likely to cause irritation

The Children We Abandon: Religious Exemptions to Child Welfare and Education Law as Denials of Equal Protection to Children of Religious Objectors, 74 N.C. L. REV. 1321, 1323–24 (1996) (asserting that children do not receive equal protection of the law when their parents claim religious exemptions based on beliefs in faith-healing); Robin Fretwell Wilson, *The Perils of Privatized Marriage*, in MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT: RECONSIDERING THE BOUNDARIES OF CIVIL LAW AND RELIGION 258–61 (Joel A. Nichols ed., 2011) (examining the serious costs to children when states give parents complete authority to make treatment decisions).

¹¹⁴ See, e.g., *Doswell v. Smith*, 139 F.3d 888, 1998 WL 110161, at *1–2, 5–6 (4th Cir. 1998) (unpublished table decision).

¹¹⁵ See Greenawalt, *supra* note 112, at 25–26 (“One way of minimizing the success of insincere claims is, as I have suggested, to limit an exemption to religious claims, which many people may be more hesitant to make up, given the typical tie of religious convictions to institutional affiliations.”).

¹¹⁶ See *supra* note 31 (discussing *Cenzon-DeCarlo v. Mount Sinai Hospital*).

¹¹⁷ See *supra* note 31 (same).

¹¹⁸ See Stephanie Rabiner, *NJ Bridal Store Refuses to Sell Lesbian a Dress*, REUTERS, Aug. 18, 2011, available at <http://www.reuters.com/article/2011/08/19/tagblogsfindlawcom2011-free-enterprise-id US2751876420110819>; Megan Gibson, *New Jersey Bridal Shop Refuses to Sell Wedding Gown to Lesbian Bride*, TIME (Aug. 21, 2011), <http://newsfeed.time.com/2011/08/21/new-jersey-bridal-shop-refuses-to-sell-wedding-gown-to-lesbian-bride/#ixzz1jjPMLGhe>; Tina Susman, *N.J. Bridal Salon Slammed for Refusing to Sell Gown to Lesbian*, L.A. TIMES (Aug 22, 2011, 9:46 AM), <http://latimesblogs.latimes.com/nationnow/2011/08/bridal-salon-slammed-for-refusing-gown-to-lesbian.html>.

of superiors or colleagues that could down the road hurt [one's] chances for a promotion or informal benefits, a person has no incentive to make an insincere claim.¹¹⁹

Even though many individuals will not be motivated to feign a religious objection, sincerity questions can and do arise in some cases—from prisoners requesting religious accommodations to military conscientious objectors. In each context, courts have generally proven competent to separate the sincere plaintiff from the insincere. In the prison context, the Religious Land Use and Institutionalized Persons Act (RLUIPA) directs prison officials not to “impose a substantial burden on the religious exercise of a person residing in or confined to an institution.”¹²⁰ Some prisoners bring lawsuits based on religious claims to harass prison administrators or to gain perks they cannot otherwise secure. For instance, in 2010, an inmate in an Orange County, California jail claimed to celebrate the *Seinfeld* holiday, Festivus, in order to get double portions of food.¹²¹ There, prison officials determined that the inmate's religious claim was not sincere.¹²² Obviously, many other prisoners do bring claims with merit.¹²³

Because both sincere and insincere claims can arise, in the 2005 case *Cutter v. Wilkinson*, the U.S. Supreme Court gave prison officials considerable leeway to test the sincerity of a prisoner's stated need for accommodation, without which a prisoner-plaintiff cannot take advantage of federal statutory religious accommodations:

[P]rison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic. Although RLUIPA bars inquiry into whether a particular belief or practice is central to a prisoner's religion, the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity. The truth of a belief is not open to question; rather, the question is whether the objector's beliefs are truly held.¹²⁴

¹¹⁹ Greenawalt, *supra* note 112, at 25.

¹²⁰ 42 U.S.C. § 2000cc-1(a) (2006).

¹²¹ Tony Barboza, *Inmate Claims Bogus Religion*, L.A. TIMES, Dec. 15, 2010, at AA4.

¹²² *Id.*

¹²³ See, e.g., *Grayson v. Schuler*, 666 F.3d 450, 455 (7th Cir. 2012) (reversing summary judgment against a pro se Rastafarian inmate suing under RLUIPA because prison officials cut the plaintiff's dreadlocks).

¹²⁴ 544 U.S. 709, 725 n.13 (2005) (citations and quotation marks omitted).

Similarly, the military has long had a detailed system for evaluating the sincerity of conscientious objections to military service.¹²⁵

Tests for sincerity parallel the examination of “pretext” that is common to most employment discrimination litigation in the federal courts. Under the framework developed by the Supreme Court in the 1973 case, *McDonnell Douglas Corp. v. Green*, courts must evaluate whether an employer’s proffered nondiscriminatory reason for an adverse employment action is a pretext for invidious discrimination.¹²⁶

Although these contexts differ in important ways, together they underscore that courts have the institutional competence to judge whether a claimed religious objection to same-sex marriage is sincere or merely pretext for animus. This is not to say, however, that deciding the sincerity of a religious belief is an easy task. Sincerity must be determined “without a view as to [the] truth or falsity” of the religious belief being claimed, a point the Supreme Court established in the 1944 decision in *United States v. Ballard*.¹²⁷ There, the government indicted leaders of a religion called “I Am” for mail fraud after the leaders solicited donations from individuals they promised to cure of diseases. The Court held that a jury could properly decide whether the leaders sincerely believed that they possessed healing abilities, but could not evaluate the religious belief itself.

Moreover, as Professor Erwin Chemerinsky points out, “[t]here is no measure for sincerity.”¹²⁸ A number of commentators have suggested guides for evaluating sincerity. For example, Professor Kent Greenawalt notes that when someone “loses her job or is demoted because she actually refuses to perform an act,” this helps to “demonstrate a true claim of conscience.”¹²⁹ But he observes that “those whose claim for an exemption is granted usually are not put to such a clear test, . . . opening an exemption . . . to those with lukewarm reservations.”¹³⁰

¹²⁵ See *Aguayo v. Harvey*, 476 F.3d 971, 973, 979–81 (D.C. Cir. 2007) (upholding the U.S. Army’s determination under Army Regulation 600-43 that a claimed conscientious objection was not “sincere and deeply held”).

¹²⁶ See 411 U.S. 792, 804 (1973).

¹²⁷ CHEMERINSKY, *supra* note 112, at 1190; see *United States v. Ballard*, 322 U.S. 78, 85–86 (1944).

¹²⁸ CHEMERINSKY, *supra* note 112, at 1190.

¹²⁹ Greenawalt, *supra* note 112, at 26 (discussing moral objections, as opposed to religious objections).

¹³⁰ *Id.*

Although it is true that the legislative accommodations described in Appendix B are designed to insulate religious objectors from lawsuits, this does not mean that objecting is cost-free. As noted above, many refusals are met with social opprobrium or stigma from one's employer, coworkers, or community, *even when* there are existing protections.¹³¹ Neither does it mean that religious objectors get a free pass. Lawsuits may follow even when a legislative accommodation is made. If an exemption is structured like that in Appendix B,¹³² an objector, if sued, may find that his or her beliefs are, in fact, subjected to a searching examination for sincerity. In the end, the difficulty of assessing sincerity remains "one reason for the law to avoid exemptions," but that reason "must be measured against the positive reasons to grant such exemptions."¹³³

B. Concerns About "Crazy" Beliefs

In the health care context, some worry that religious exemptions will legitimize scientifically unfounded ideas. Two different religious beliefs underpin objections to the coverage mandate: one contends that all sexual intercourse should have the potential for creating life—thus, procedures that sterilize a person and drugs that prevent fertilization are both objectionable.¹³⁴ The second belief focuses on emergency

¹³¹ See *supra* note 30 (discussing the exemptions available to abortion objectors), *supra* notes 31–32 (describing attempts to penalize workers claiming exemptions under existing laws).

¹³² See Appendix A for statutory accommodations that have been enacted, some of which were cobbled together in last-minute negotiations, as a consequence of which, they have drafting problems. Unlike the model provision in Appendix B, the enacted exemptions are not limited by sincerity. See, e.g., D.C. CODE § 46-406(e) (LexisNexis Supp. 2011).

¹³³ KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 110 (2006).

¹³⁴ Some religious objectors emphasize the concern over contraceptive coverage. See, e.g., Bishop Robert H. Brom, *Contraception and Sterilization*, CATHOLIC ANSWERS (Aug. 10, 2004), <http://www.catholic.com/tracts/contraception-and-sterilization> ("[O]ver the course of time the Church has called greater attention to the unitive aspect of marital intercourse, yet it remains true that the procreative aspect of each particular marital act must not be frustrated."). Many find the objection to contraceptive coverage to be incomprehensible. See, e.g., Nicholas D. Kristof, *Beyond Pelvic Politics*, N.Y. TIMES, Feb. 12, 2012, at SR11; Guttman Inst., Testimony Submitted to the Comm. on Preventive Servs. for Women, Inst. of Med. 16 (2011), available at <http://www.guttmacher.org/pubs/CPSW-testimony.pdf>; Press Release, *Majority of Catholics Think Employers Should Be Required to Provide Health Care Plans That Cover Birth Control at No Cost*, PUB. RELIGION RES. INST. (Feb. 7, 2012), <http://publicreligion.org/newsroom/2012/02/january-tracking-poll-2012>. In his column in the *New York Times*, Nicholas Kristof wrote:

contraceptives as covered drugs, with objectors maintaining that emergency contraceptives act after fertilization to destroy a life-in-being.¹³⁵ It is this second belief that gets tagged as unfounded.

The American College of Obstetricians and Gynecologists (ACOG), for example, opposed pharmacy and pharmacist exemptions from the duty to fill prescriptions for emergency contraception, saying “provider refusals to dispense emergency contraception based on unsupported beliefs about its primary mechanism of action should not be justified.”¹³⁶ ACOG argued that drugs like Plan B do not act as abortifacients, thus objectors have no medically sound basis for claiming an exemption from filling prescriptions.¹³⁷

Factually, however, this contention is simply more complicated than ACOG’s blanket assertion suggests. Plan B was approved in 1999,¹³⁸ and its label states that “[i]t works mainly by stopping the release of an egg from the ovary. It is possible that Plan B One-Step may also work by . . . preventing attachment (implantation) to the uterus

I may not be as theologically sophisticated as American bishops, but I had thought that Jesus talked more about helping the poor than about banning contraceptives. . . . The cost of birth control is one reason poor women are more than three times as likely to end up pregnant unintentionally as middle-class women.

Id. Indeed, the majority of Americans believe that it is often socially responsible to have sex without procreation. In a survey of 591 adults nationwide, who were asked whether “the birth control pill has made American family life better,” 50% of those randomly telephoned responded that it had, and 56% believed that “the birth control pill has made women’s lives better.” See CBS NEWS, POLL: THE BIRTH CONTROL PILL: 50 YEARS LATER 1–2 (2010), available at http://www.cbsnews.com/htdocs/pdf/poll_Birth_Control_Pill_050710.pdf. Religious believers did not share this view as widely. *Id.* (reporting that 38% of Catholics and 41% of white Evangelicals believed the birth control pill had made American family life better).

¹³⁵ Gene Veith, *Church Organizations Must Provide Free Contraception and Abortifacients*, CRANACH (Jan. 24, 2012), <http://www.geneveith.com/2012/01/24/church-organizations-must-provide-free-contraception-abortifacient> (“Christian organizations that oppose abortion as a matter of religious conviction will be required by law to pay for abortifacients and thus violate their religious convictions.”).

¹³⁶ AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NO. 385: THE LIMITS OF CONSCIENTIOUS REFUSAL IN REPRODUCTIVE MEDICINE 4 (2007), available at <http://www.acog.org/~/media/Committee%20Opinions/Committee%20on%20Ethics/co385.pdf?dmc=1&ts=20120728T1211090439>.

¹³⁷ See *id.*

¹³⁸ FDA’s *Decision Regarding Plan B: Questions and Answers*, FDA.GOV (Apr. 30, 2009), <http://www.fda.gov/drugs/drugsafety/postmarketdrugsafetyinformationforpatientsandproviders/ucm109795.htm>.

(womb).”¹³⁹ As late as 2004, Charles Lockwood, a member of the scientific advisory committee to the U.S. Food & Drug Administration (FDA) that held hearings about whether to make Plan B available over the counter and now dean of Yale University’s medical school, explained that:

[m]any on the FDA panel perceived that a contragestive effect [e.g., an effect after fertilization occurs] was possible and we recommended that the package labeling should describe the drug’s potential mechanism of action so that women could make an informed choice about its use and avoid inadvertently violating their own moral or religious beliefs.¹⁴⁰

Despite these early concerns about a post-fertilization effect, since Plan B’s initial approval by the FDA, the only way that Plan B has been

¹³⁹ U.S. FOOD & DRUG ADMIN., PLAN B ONE-STEP PRESCRIBING INFORMATION 7 (2009) [hereinafter PLAN B PRESCRIBING INFORMATION], available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2009/021998lbl.pdf.

¹⁴⁰ Charles J. Lockwood, *OTC Emergency Contraception: The Right Choice*, CONTEMP. OB/GYN, Jan. 2004, at 15 (discussing the available evidence and positing “that even if 10% of women experience the contragestive effect of Plan B, its [over-the-counter] availability will prevent far more abortions, performed further along in gestation”). Lockwood cited work showing a contragestive effect, and noted that by 2002:

There [was] also evidence that the endometrial epithelium in both the periovulatory and luteal phases is disrupted by [Plan B], leading one group of investigators to conclude that its emergency contraceptive effect was mediated by alteration of the endometrial surface and, therefore, receptivity [of the implanting embryo]. Because many of the key regulators of blastocyst attachment and early implantation (such as integrins, cytokines, and glycopeptides) are regulated by steroid hormones, there is also the potential for more subtle biochemical derangements.

Id.; see also G. Ugocsai et al., *Scanning Electron Microscopic (SEM) Changes of the Endometrium in Women Taking High Doses of Levonorgestrel as Emergency Postcoital Contraception*, 66 CONTRACEPTION 433, 433 (2002) (“[E]mergency methods of contraception. . . exert their negative effect on fertility by . . . creating unfavorable conditions for the *implantation* or for the establishment of a pregnancy.” (emphasis added)).

Despite this evidence, in an editorial the *New York Times* lamented:

Belief that [Plan B] might be an abortifacient stems from speculative language that the [FDA] approved for its original label, which listed a number of physiological processes by which the pill might prevent pregnancy, including preventing fertilized eggs from implanting in the womb. There was no evidence to support that view at the time, and there is none to support it now.

Editorial, *How Morning-After Pills Really Work*, N.Y. TIMES, June 9, 2012, at A20, available at <http://www.nytimes.com/2012/06/09/opinion/how-morning-after-pills-really-work.html>; see also Pam Belluck, *Abortion Qualms on Morning-After Pill May Be Unfounded*, N.Y. TIMES June 6, 2012, at A1 (reviewing evidence that Plan B acts to prevent fertilization).

demonstrated to operate is as a contraceptive—meaning that it works to prevent fertilization entirely.¹⁴¹ Studies report, for example, that Plan B works to prevent fertilization by: (1) impeding the sperm's ability to reach the egg and (2) delaying ovulation so there is no egg released to meet the sperm.¹⁴² Still, while Plan B appears to have no effect after fertilization, the authors of the studies supporting this conclusion acknowledge that post-fertilization effects cannot be definitively ruled out.¹⁴³

The evidence about newer emergency contraceptives like ella, approved in 2010, is shaping up very differently.¹⁴⁴ Whereas Plan B is ef-

¹⁴¹ See *infra* note 142.

¹⁴² Gabriela Noé et al., *Contraceptive Efficacy of Emergency with Levonorgestrel Given Before or After Ovulation*, 81 *CONTRACEPTION* 414, 414, 419, 420 (2010) (stating that “[i]t is established that preovulatory administration of LNG [Plan B] interferes with the ovulatory process” and finding from a comparison of the number of expected and actual pregnancies after “unprotected intercourse during fertile cycle days” among women who took LNG-EC [Plan B] on the day of ovulation or immediately thereafter” that the “difference was not statistically significant,” showing that Plan B “is very effective in preventing pregnancy when it is administered before ovulation, but it is ineffective in preventing pregnancy once fertilization has occurred”); James Trussell & Beth Jordan, Editorial, *Mechanism of Action of Emergency Contraceptive Pills*, 74 *CONTRACEPTION* 87, 87 (2006) (“Levonorgestrel [Plan B] also interferes with sperm migration and function at all levels of the genital tract.”).

¹⁴³ Although studies of Plan B's contraceptive mechanism of action are now seen as dispositive, the authors of those studies acknowledge that “[i]t is unlikely that this question can ever be unequivocally answered, and we therefore cannot conclude that [emergency contraceptives] never prevent pregnancy after fertilization.” Trussell & Jordan, *supra* note 142, at 87; see also Noé et al., *supra* note 142, at 414 (conceding that studies of the impact of Plan B on “endometrial receptivity,” a post-fertilization effect, “are not consistent, and current knowledge on cellular and molecular markers of endometrial receptivity in the human is insufficient to resolve this controversy”).

We cannot be one hundred percent sure about how Plan B or other emergency contraceptives work in humans because, as noted by Jeffrey Keenan, a professor of obstetrics and gynecology and director of the Division of Reproductive Endocrinology and Infertility at the University of Tennessee Medical Center, the “Phase 2 and 3 clinical studies were not designed to assess this possibility.” Jeffrey Keenan, *Ulipristal Acetate: Contraceptive or Contraceptive?*, 45 *ANNALS OF PHARMACOTHERAPY* 813, 814 (2011). To be sure of the mechanism of action would require “each study participant to undergo laboratory evaluation and possibly sonographic examination to determine whether ovulation had already occurred.” *Id.* Presumably, the makers of emergency contraceptives would not want to do such studies.

¹⁴⁴ Some commentators lump Plan B and ella together in their discussions, failing to distinguish between the mechanisms by which the two drugs appear to work. See, e.g., Keith Fournier, *Plan B and Ella: Morning After Contraceptives Can Induce Abortion*, CATHOLIC ONLINE (Feb. 12, 2012), http://www.catholic.org/national/national_story.php?id=44730 (discussing Plan B and ella and concluding that they both “may result in the eviction of an embryonic human person”). For those who, like the Catholic Church, maintain that life begins at conception, parsing the exact mechanisms of Plan B and ella is irrelevant to the moral calculus of dispensing them.

fective for up to 72 hours after unprotected sex,¹⁴⁵ ella works up to 120 hours after unprotected sex¹⁴⁶ and is much more effective in preventing pregnancy than Plan B. In one study, ella prevented 85% of expected pregnancies, compared to Plan B's 69%.¹⁴⁷

A number of authorities believe that ella's enhanced effectiveness stems in part from post-fertilization mechanisms of action, although ella clearly also works to prevent the release of an egg from the ovary, and therefore prevents fertilization itself, as Plan B does.¹⁴⁸ A 2011 article in the *Annals of Pharmacotherapy* concluded that if a woman happens to take ella within five days after unprotected sex—and *after* the egg has already been fertilized—ella's "mechanism of action is much more accurately described as contragestive, since only gestation (implantation and growth) of the embryo [fertilized egg] is prevented" during that time frame.¹⁴⁹ Indeed, this contragestive effect likely accounts for ella's "enhanced effectiveness . . . compared with [Plan B]."¹⁵⁰

One author posits that with ella, "there is a unique circumstance and time period in which [ella] would have a direct abortifacient effect"—defined in the article to mean "loss of the embryo occurring either at the preimplantation stage or at the post-implantation stage"¹⁵¹—"rather than a contraceptive effect."¹⁵² This would occur when "unprotected intercourse occurs within the fertility window (i.e., less than 120 hours (5 days) before ovulation or not more than 24 hours after ovulation) and [ella] is taken after fertilization."¹⁵³ Professor Ralph Miech, an asso-

¹⁴⁵ PLAN B PRESCRIBING INFORMATION, *supra* note 139, at 7.

¹⁴⁶ U.S. FOOD & DRUG ADMIN., ELLA PRESCRIBING INFORMATION *7 (2010) [hereinafter ELLA PRESCRIBING INFORMATION], available at http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s0001bl.pdf.

¹⁴⁷ Kristina Gemzell-Danielsson & Chun-Xia Meng, *Emergency Contraception: Potential Role of Ulipristal Acetate*, 2 INT'L J. WOMEN'S HEALTH 53, 57 (2010).

¹⁴⁸ *Id.* at 59 ("UPA [ella] has been demonstrated to have a direct inhibitory effect on follicular rupture. This allows UPA [ella] to be effective even when administered shortly before ovulation when the LH surge has already started to rise, a time period when use of LNG [Plan B] is no longer effective.").

¹⁴⁹ Keenan, *supra* note 143, at 814; see ELLA PRESCRIBING INFORMATION, *supra* note 146, at *9.

¹⁵⁰ Keenan, *supra* note 143, at 814.

¹⁵¹ Ralph P. Miech, *Immunopharmacology of Ulipristal as an Emergency Contraceptive* 3 INT'L J. WOMEN'S HEALTH 391, 392 (2011) (noting that "[t]his report [uses] the classical definitions of abortion and contraceptive. Abortion is defined as the loss of the embryo occurring either at the preimplantation stage or at the post-implantation stage and contraception is defined as the prevention of fertilization.").

¹⁵² *Id.* (noting elsewhere that "[a]n abortifacient effect of [ella] can occur when [ella] is taken post-fertilization but prior to implantation, when the progesterone levels are relatively low").

¹⁵³ *Id.*

ciate professor emeritus of molecular pharmacology, physiology, and biotechnology at Brown University, believes that ella “blocks the immunotolerance effects of progesterone on the maternal innate immune system . . . , resulting in the immunorejection of an embryo attempting to implant.”¹⁵⁴

In line with this evidence, ella’s FDA label states under the heading “How does ella work?” that “ella is thought to work . . . primarily by stopping or delaying the release of an egg from the ovary. It is possible that ella may also work by preventing attachment (implantation) to the uterus.”¹⁵⁵ As with Plan B, evidence of ella’s precise mechanisms of action may evolve as new studies accumulate.¹⁵⁶

The evidence of a contragestive effect, as opposed to a contraceptive one, begs the question of whether a drug that acts after fertilization or implantation should count as an abortifacient—itself a deeply contested matter.¹⁵⁷ But whatever one considers to be an abortifacient, more than half of women in one study—fifty-three percent—said they would not use a birth control method that acts after fertilization.¹⁵⁸ In

¹⁵⁴ *Id.* at 391. As Professor Miech explains, “Inadequate progesterone synthesis results in spontaneous abortions” as a matter of course. *Id.*; see also Pamela Stratton et al., *Endometrial Effects of a Single Early Luteal Dose of the Selective Progesterone Receptor Modulator CDB-2914*, 93 *FERTILITY & STERILITY* 2035, 2039–40 (2010) (“[ella caused] a significant dose-dependent decrease in endometrial thickness [and] an increase in glandular [progesterone] receptors. . . . Either effect . . . may hamper implantation.”). See generally Robin Fretwell Wilson, *The Erupting Clash Between Religion and the State over Contraception, Sterilization and Abortion* (2012) (unpublished manuscript) (on file with author) (providing a more complete discussion of this and other studies demonstrating that ella works not only as a contraceptive but also as a contragestive).

¹⁵⁵ ELLA PRESCRIBING INFORMATION, *supra* note 146, at *9; see Veith, *supra* note 135.

¹⁵⁶ Popular reporting on ella emphasizes both the findings about ella’s possible mechanisms of action and the uncertainty remaining about those mechanisms. See, e.g., Belluck, *supra* note 140 (“Research on Ella . . . is less extensive, but the F.D.A., Dr. Blithe, and others say evidence increasingly suggests it does not derail implantation, citing, among other things, several studies in which women became pregnant when taking Ella after ovulating. The studies, focused on Ella’s effectiveness, were not designed to determine if it blocked implantation, but experts still consider them significant.”); Rob Stein, *5-Day-After Contraceptive Wins FDA Approval*, WASH. POST, Aug. 14, 2010, at A1 (“Ella . . . works as a contraceptive by blocking progesterone’s activity, delaying the ovaries from producing an egg. But progesterone is also needed to prepare the womb to accept a fertilized egg and to nurture a developing embryo . . . Ella’s chemical similarity to RU-486 [a controversial abortifacient] raises the possibility that it might do the same thing, perhaps if taken at elevated doses. But no one knows for sure whether the drug would induce an abortion, because the drug has never been tested that way.”).

¹⁵⁷ See Wilson, *supra* note 154.

¹⁵⁸ Huong M. Dye et al., *Women and Post-Fertilization Effects of Birth Control: Consistency of Beliefs, Intentions and Reported Use*, 5 *BMC WOMEN’S HEALTH*, no. 11, Nov. 28, 2005, at 3, available at <http://www.biomedcentral.com/content/pdf/1472-6874-5-11.pdf> (surveying 748 women, aged 18–50, seen in Utah and Oklahoma family practices and OB/GYN clinics).

the same study, forty-four percent of women said they would “stop using” their birth control method if told that “there was even [a] remote possibility” that it acted after fertilization.¹⁵⁹

Like ordinary women across multiple cultures,¹⁶⁰ objectors could seek exemptions not because they positively knew that by filling a prescription they were cutting short a potential life, but because they could not positively know they were *not*. Ultimately, then, this is a question about who gets to decide in instances of uncertainty.¹⁶¹

Of course, when claims of faith are involved, the requirement that the rest of society agree with the objector’s belief in order for the objector to receive protection would leave almost nothing of religious freedom. As Justice William Douglas noted, writing for the Supreme Court in *Ballard*, “Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.”¹⁶² The Court reiterated this principle in its 1981 decision in *Thomas v. Review Board of Indiana Employment Security Division*, explaining that “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”¹⁶³

III. THIRD STICKING POINT: OBJECTORS ARE PROTECTED FROM DOING THE DEED—SOLEMNIZING A MARRIAGE OR PERFORMING AN ABORTION—AND THAT IS SUFFICIENT

Accommodations invariably raise the question about who precisely will receive protection. In both the same-sex marriage context and the health care context, many readily concede that religious objectors should be protected when actually performing a morally freighted service, like presiding over nuptials or ending a pregnancy, but resist protections for others acting in less direct capacities. Put another way, some contend that, on these questions, society should protect only priests and doctors.

¹⁵⁹ See *id.* at 4.

¹⁶⁰ See Wilson, *supra* note 154 (collecting studies across multiple countries of women’s attitudes toward using birth control methods that may act after fertilization or implantation).

¹⁶¹ To be sure that emergency contraception was acting only to prevent fertilization, and not at a later stage (either before or after implantation), would require “historical knowledge of the woman’s menstrual cycles, ultrasound examination, and [certain] hormone surge testing.” Keenan, *supra* note 143, at 814. Surely, nobody really wants to resolve this uncertainty at the expense of women.

¹⁶² *Ballard*, 322 U.S. at 86–87.

¹⁶³ 450 U.S. 707, 714 (1981).

Consider this claim first as to same-sex marriage. Every draft same-sex marriage bill has unambiguously protected the refusal to solemnize a marriage,¹⁶⁴ notwithstanding the shared intuition that churches and clergy cannot be forced to solemnize marriages in violation of their religious tenets.¹⁶⁵ But legislators responsible for the text of the draft bills have been much more skeptical when it comes to crafting a “compromise that permits continued discrimination outside of solemnizing a marriage in a church sanctuary.”¹⁶⁶ In a clever column, Professor John Corvino captures the tension over protecting more than solemnization:

[T]he gay-rights debate concerning religious accommodation is not about *worship*. No serious person argues that the government should force religions to perform gay weddings (or ordinations or baptisms or other religious functions) against their will. That would violate the First Amendment, and beyond that, it would be *foolish and wrong*. Rather, the debate is about *the not-strictly-religious things* that religious organizations often do: renting out banquet space, for example, or hiring employees for secular tasks. And it’s about religious individuals who for reasons of conscience wish to discriminate in secular settings.¹⁶⁷

Professor Corvino’s comments encompass three related claims, although they are unstated: (1) that facilitating a ceremony is not a religious act in the way that performing the ceremony itself is; (2) that an objector’s claim weakens when it extends to services routinely provided by commercial entities, such as renting a banquet hall; and (3) that a religious objector may legally or morally object when asked directly to “do the deed”—to solemnize a relationship—but that an objector’s moral or legal claim weakens when less direct actions are at stake.¹⁶⁸

¹⁶⁴ See generally Wilson, *supra* note 49 (discussing the legislative history of same-sex marriage legislation in selected states).

¹⁶⁵ See, e.g., U.S. CONST. amend. I; Letter from Anthony R. Picarello, Jr. to Deborah Kelly regarding D.C. Bill No. 18-0482, “Religious Freedom and Civil Marriage Equality Amendment Act of 2009,” at 4 (Nov. 9, 2009) (on file with author) (remarking on “how [the District of Columbia’s] bill so thoroughly addresses the non-threat of compelled officiating at religious ceremonies”); John Corvino, *Religious Exemptions and the Slippery Slope*, MEEFERS.COM (Dec. 7, 2009), <http://dev.meefers.com/features.asp?id=629>.

¹⁶⁶ See, e.g., *Hearing on D.C.’s Same-Sex Marriage Bill*, *supra* note 40, at 7:00:32 (statement of Councilmember Phil Mendelson).

¹⁶⁷ Corvino, *supra* note 165 (emphasis added).

¹⁶⁸ See *id.* Also implicit is the assumption that social services provided by religious organizations are not as inherently “religious” as other activities. Yet religious organizations

The first claim to assess is whether facilitating a same-sex marriage should be entitled to protection. Religious objectors, from wedding planners to landlords, all may seek to step aside from providing certain services because they “feel that they are being asked to promote or facilitate sin in a way that makes them personally responsible for the sin that ensues.”¹⁶⁹ Professor Douglas Laycock believes there is a tendency “to dismiss these feelings of moral responsibility” because “the person providing services to a same-sex couple is not participating in the . . . conduct she considers immoral and cannot reasonably think of herself as responsible for it.”¹⁷⁰ Yet, he contends, “that is a mistake” because “[m]any religious traditions have a long history of theological teaching attempting to identify the point at which one who cooperates with another’s wrongdoing, or even one who fails to sufficiently resist, becomes personally responsible for that wrongdoing.”¹⁷¹ Certainly, with other actions, ideas of complicity and vicarious moral responsibility have not seemed so far-fetched. They underpinned, for example, boycotts of companies doing business in South Africa during apartheid.¹⁷²

The religious liberty exemptions contained in recently enacted same-sex marriage laws clearly see claims of facilitation as worthy of respect: all of them exempt religious institutions from facilitating or celebrating a marriage through such actions as providing the space for a reception.¹⁷³ In three instances, the laws exempt individual employees of religious organizations more generally from the duty to “celebrate[] or promote[]” same-sex marriage if doing so would violate their “religious beliefs and faith.”¹⁷⁴

may view these services as part of a larger ministry to which the group is called. See Thomas C. Berg, *Taking Exception: Gay Marriage Legislation*, 26 CHRISTIAN CENTURY 12, 12 (2009) (“People from many perspectives—religious progressives as well as traditionalists—should affirm the principle that the exercise of religion does not stop at the church door, but carries over into organizational works of charity and justice motivated by faith.”); Thomas C. Berg, *Other People’s Freedom*, CHRISTIAN CENTURY (Dec. 19, 2011), <http://www.christiancentury.org/blogs/archive/2011-12/other-peoples-freedom> (“[F]or progressive Christians, acts of mercy and justice, serving all people, are at the heart of the gospel, even if these acts witness implicitly rather than explicitly. Catholic social services and health-care institutions reflect that model, as do many evangelical agencies.”).

¹⁶⁹ Douglas Laycock, *Afterword*, in EMERGING CONFLICTS, *supra* note 30, at 195.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 195–96.

¹⁷² See *id.* at 196.

¹⁷³ See *infra* app. B; see also *supra* note 57 and accompanying text (discussing one case addressing this issue, *Bernstein v. Ocean Grove Camp Meeting Ass’n*).

¹⁷⁴ Compare N.H. REV. STAT. ANN. § 457:37(III) (Supp. 2011) (exempting individuals associated with religious organizations from providing “services, accommodations, advantages, facilities, goods, or privileges to an individual if such request . . . is related to the

But those same laws offer no protection to businesses or individuals in the marketplace who provide catering, flowers, reception halls, or gowns.¹⁷⁵ This brings us to the question of whether the law should distinguish between religious organizations and for-profit commercial vendors, even when providing identical services.

In other contexts, the law has not drawn the line for an exemption along a non-profit versus for-profit divide. For example, with respect to abortion, many conscience clauses exempt non-profit and for-profit providers alike. Thus, for example, the Church Amendment provides that the receipt of certain federal funds cannot be used by courts or public officials to force any entity to “make its facilities available for the performance of any sterilization procedure or abortion if [it] is prohibited by the entity on the basis of religious beliefs or moral convictions,” or “provide any personnel for [such services].”¹⁷⁶ This protection is not limited to nonprofit organizations or denominational hospitals. Clearly, the services at issue are provided in the commercial marketplace by non-objecting institutions.¹⁷⁷ Therefore, at least in the abortion context, it is not *who* the objector is, but *what* the objector is being asked to do that merits protection.

Moreover, the law has not always required direct participation in order to receive protection. Again, the abortion conscience clauses are illustrative. Many insulate not just the physician who performs the abortion, but any person asked to assist in its performance. This is true of

solemnization of a marriage, the celebration of a marriage, or the promotion of marriage . . . and such solemnization, celebration, or promotion of marriage is in violation of his or her religious beliefs”), with N.Y. DOM. REL. LAW § 10-b (McKinney Supp. 2012) (providing that “any employee” of “a religious entity . . . or a corporation incorporated under the benevolent orders law . . . or a not-for-profit corporation operated, supervised, or controlled by a religious corporation . . . shall not be required to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage”) and H.B. 438, 2012 Leg., 430th Sess. (Md. 2012) (exempting religious officials from any requirement “to solemnize or officiate any [] marriage” if doing so would impede the official’s free exercise rights).

¹⁷⁵ To date, states have provided protection to religious institutions and nonprofit organizations when they provide space for a reception or otherwise facilitate or celebrate a marriage. See *supra* notes 63–77 and accompanying text. Thus, they would exempt a church-affiliated nonprofit from hosting a wedding reception for same-sex couples, but would not exempt a commercial bed-and-breakfast. See *supra* notes 57–62 and accompanying text (discussing suits against the Ocean Grove Camp Meeting Association and the Wildflower Inn).

¹⁷⁶ 42 U.S.C. § 300a-7(b)(2) (2006).

¹⁷⁷ See Wilson, *Limits of Conscience*, *supra* note 32, at 53 (discussing the network of Planned Parenthood clinics across the country).

both state-level exemptions¹⁷⁸ and federal conscience protection.¹⁷⁹ Some federal protections reach services outside those that most would view as “core”—the abortion procedure itself—to encompass more peripheral activities, like training and referrals for abortion.¹⁸⁰ Some health care conscience clauses are so broad that they exempt objectors from performing *any* service they find objectionable if the facility receives certain program funding from the federal government.¹⁸¹

The accommodation of an employee’s religious beliefs in the employment context follows this pattern as well. Title VII of the Civil Rights Act of 1964 (“Title VII”) requires employers to provide reasonable accommodations for an employee’s religious practice or belief unless the employer will experience an undue hardship.¹⁸² As thinned-out as Title VII’s protections are now,¹⁸³ Title VII imposes this duty even

¹⁷⁸ See ARIZ. REV. STAT. ANN. § 36-2154(A) (Supp. 2011) (“any other person”); ARK. CODE ANN. § 20-16-601(a) (2005) (“No person shall be required”); COLO. REV. STAT. § 18-6-104 (2011) (“A person who is a member of or associated with the staff”); DEL. CODE ANN. tit. 24, § 1791(a) (2011) (“No person”); FLA. STAT. ANN. § 390.0111(8) (West 2008 & Supp. 2012) (“No person”); GA. CODE ANN. § 16-12-142(a) (2011) (“any person who states in writing an objection”); HAW. REV. STAT. § 453-16(e) (2011) (“any person”); IDAHO CODE ANN. § 18-612 (2004) (“Any such person”); 720 ILL. COMP. STAT. ANN. 510 / 13 (West 2010) (“employee thereof”); IND. CODE ANN. § 16-34-1-4 (LexisNexis 2011) (“[e]mployee or member of the staff of a hospital or other facility”); IOWA CODE ANN. § 146.1 (West 2005) (“An individual”); KAN. STAT. ANN. § 65-443 (2002) (“No person”); ME. REV. STAT. ANN. tit. 22, §§ 1591–92 (2004) (“other person”); MICH. COMP. LAWS ANN. § 333.20181 (West 2008) (“associate of the staff, or other person connected therewith”); MINN. STAT. § 145.414(a) (2010) (“No person”); N.M. STAT. ANN. § 30-5-2 (2004) (“A person who is a member of, or associated with, the staff of a hospital, or any employee of a hospital”); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 2009) (“any person . . . by filing a prior written refusal”); N.D. CENT. CODE § 23-16-14 (2012) (“No . . . physician, nurse, hospital employee, nor any other person”); OHIO REV. CODE ANN. § 4731.91(D) (West 2004) (“No person”); 18 PA. CONS. STAT. ANN. § 3213(d) (West 2000) (“no medical personnel or medical facility, nor any employee, agent or student thereof”); R.I. GEN. LAWS § 23-17-11 (2008) (“A physician or any other person who is a member of or associated with the medical staff of a health care facility or any employee of a health care facility . . . and who shall state in writing an objection.”); S.D. CODIFIED LAWS § 34-23A-12 (2011) (“No physician, nurse, or other person.”); TENN. CODE ANN. § 39-15-204 (2010) (“no person”); VA. CODE ANN. § 18.2-75 (2009) (“any person”); CONN. AGENCIES REGS. § 19-13-D54(f) (2006) (“No person”).

¹⁷⁹ See, e.g., 42 U.S.C. § 300a-7(d) (“No individual”).

¹⁸⁰ See, e.g., *id.* § 238n.

¹⁸¹ See, e.g., *id.* § 300a-7(d) (“No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.”).

¹⁸² See 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1) (2006).

¹⁸³ In the 1977 case *Trans World Airlines, Inc. v. Hardison*, the Supreme Court interpreted Title VII’s religious accommodation requirement narrowly to hold that an employer need not provide reasonable accommodations to an employee if it would impose

when the objector does not directly facilitate the activity to which she objects. Thus, Title VII's protections have extended to nurses who do not want to assist with abortions,¹⁸⁴ clerks who process draft registration forms at the post office,¹⁸⁵ and Internal Revenue Service (IRS) agents who process applications for tax exemption for abortion providers.¹⁸⁶ Although employers may consider hardships to themselves and other employees in granting or refusing an accommodation, nothing suggests that only those *directly* involved in a challenged activity can or should be exempted. The expansive protections in the employment and health care contexts reflect the reality that many people believe they are personally accountable for facilitating another person's actions.

It is possible that a claim for exemption may be so remote that it is beyond cognizance and society's willingness to protect it. For instance, in the health care context, an Iowa Attorney General Opinion concluded that the state's abortion conscience clause extended by its terms only to those who "recommend[], perform[], or assist[] in an abortion

more than a de minimis burden on the employer or an employee's coworkers. *See* 432 U.S. 63, 84 (1977).

¹⁸⁴ For example, in the 2000 case *Shelton v. University of Medicine & Dentistry of New Jersey*, the U.S. Court of Appeals for the Third Circuit considered staff nurse Yvonne Shelton's Title VII religious discrimination claim that she was required to perform emergency abortions despite her request not to. 223 F.3d 220, 222 (3d Cir. 2006). Although the court ultimately granted summary judgment in favor of Shelton's employer, a state hospital, it concluded that Shelton had established a prima facie case of religious discrimination. *Id.* at 225, 228. Shelton worked in the hospital's Labor and Delivery (L&D) section. *Id.* at 222. Although elective abortions were not performed in the L&D section, emergency abortions occasionally were. *Id.* A devout Pentecostal, Shelton refused to participate in the emergency abortions, delaying treatment on several occasions. *Id.* at 223. Budget cuts made it impossible for the hospital to hire staff around Shelton's refusal. *Id.* The hospital informed Shelton that she could no longer work in L&D, but it offered to transfer her to another unit or to help her secure an open position elsewhere in the hospital. *Shelton*, 223 F.3d at 223. When Shelton refused, she was fired; subsequently Shelton brought suit under Title VII, alleging religious discrimination. *Id.* The court concluded that Shelton had established a prima facie case for discrimination under Title VII, which shifted the burden "to the Hospital to show either that it offered Shelton a reasonable accommodation, or that it could not do so because of a resulting undue hardship." *Id.* at 225. The court concluded that the hospital provided reasonable accommodations for Shelton because the proffered transfer would not have resulted in a loss of pay or benefits, and the service Shelton would perform in another unit would not have been "religiously untenable." *Id.* at 226. Shelton's steadfast refusal to "cooperate in attempting to find an acceptable religious accommodation" ultimately doomed her claim. *See id.* at 228.

¹⁸⁵ *See* Wilson, *supra* note 46, at 354–55 (discussing *Am. Postal Workers Union, S.F. Local v. Postmaster Gen.*, 781 F.2d 772 (9th Cir. 1986) and *McGinnis v. U.S. Postal Serv.*, 512 F. Supp. 517 (N.D. Cal. 1980)).

¹⁸⁶ *See id.* at 355–57 (discussing *Haring v. Blumenthal*, 471 F. Supp. 1172 (D.D.C. 1979)).

procedure.”¹⁸⁷ Consequently, nurses who provide comfort to a patient and pharmacists who prepare the saline solution used in abortions could not use the conscience clause to refrain from doing their jobs. The opinion emphasized the slippery slope that a contrary decision would create: “[O]ne could eventually get to the point where the man who mines the iron ore that goes to make the steel, which is used by a factory to make instruments used in abortions could refuse to work on conscientious grounds.”¹⁸⁸ Clearly, the state can and must draw lines to avoid hardships to the public, as well as frivolous claims of conscience.

The exemptions proposed in Appendix B would exempt religious groups from “provid[ing] goods or services that assist or promote the solemnization or celebration of any marriage” when the group cannot, for religious reasons, celebrate or promote a given marriage, and they would insulate such groups from private suit or government penalty for such refusal,¹⁸⁹ as numerous states now do.¹⁹⁰ The proposed package of exemptions would also provide protection to individuals in commerce and government employees, but *only* in those situations in which no substantial hardship for same-sex couples would result.¹⁹¹

Professor Kent Greenawalt has asked about the outer boundaries of such exemptions: would they cover only the clerk who assists with and processes the marriage paperwork, or would they also extend to a clerk who hands blank forms to the couple or to the cashier who takes their license fee?¹⁹² All these services arguably facilitate the marriage because they all directly involve the marriage licensing process. It is difficult to pinpoint the precise degree of involvement warranting an exemption. But clearly, an exemption should not cover the security officer who unlocks the clerk’s office in the morning because unlocking the building is not particular to facilitating same-sex marriages—the office must be unlocked to facilitate all of the office’s other business throughout the day. Put another way, because the office must be open

¹⁸⁷ 41 Iowa Op. Att’y Gen. 474, 478 (1976).

¹⁸⁸ *See id.*

¹⁸⁹ *See infra* app. B, § (b)(1)(A). Separate provisions address employee benefits and housing.

¹⁹⁰ *See infra* app. A.

¹⁹¹ *See infra* app. B. In the case of government employees, the couple must be able to receive the requested service immediately, but for commercial vendors, the couple must be able to secure the desired service without substantial hardship. *See infra* app. B. Thus, these exemptions would *not* allow religious individuals in commerce or government employment to act as a roadblock on the path to marriage.

¹⁹² *See* Kent Greenawalt, *Refusals of Conscience: What Are They and When Should They Be Accommodated?*, 9 AVE MARIA L. REV. 47, 60 (2010).

to the public for a number of services, there is no meaningful sense in which the guard's service "celebrates" or "assists" the "solemnization" of any particular couple's marriage. Neither is there any reason for the security guard to know the occasion for any particular couple's visit to the clerk's office; this suggests that any refusal has nothing to do with sincere religious objections to the marriage.

More fundamentally, there is no reason to take a crabbed view of assistance in the same-sex marriage context. It is true that limiting exemptions to *direct* involvement in a morally freighted activity is a device for minimizing hardships to same-sex couples, but an exemption qualified by *hardship* to same-sex couples also serves this limiting function. Thus, at a time when the public remains deeply divided about same-sex marriage, legislators can soften the blow of legislative defeat for people who cannot, consistent with their faith, facilitate same-sex marriages by allowing them to step aside—without imposing great costs on same-sex couples.

In the health care context, others have observed that, although exemptions have been granted in life-and-death matters—like abortion and physician-assisted suicide,¹⁹³ both of which involve being forced to end a life—more general protections for conscience objections have not been as forthcoming.¹⁹⁴ One way to interpret this pattern is that a religious objector's claim weakens significantly when less direct actions are required.

At least one commentator would count as providing "assistance" anyone with "significant personal contact with the patients," but not, for example, the person who makes a patient's bed.¹⁹⁵ Advocates like the Alliance Defense Fund (ADF), which represented the nurses in

¹⁹³ The federal government and forty-seven states have provided some exemptions to the duty to assist with abortion. See Wilson, *supra* note 30, at app.; see, e.g., OR. REV. STAT. § 127.885(4) (2011) ("No health care provider shall be under any duty, whether by contract, by statute or by any other legal requirement to participate in the provision to a qualified patient of medication to end his or her life in a humane and dignified manner.").

¹⁹⁴ See Lupu & Tuttle, *supra* note 46, at 290 n.80. Conscience protections may be more capacious than Professors Ira Lupu and Robert Tuttle suggest. Some exemptions allow providers to step away from *any* service that violates their moral or religious beliefs—if the service is funded by specific federal programs. See *supra* note 181 (providing the text of the Church Amendment). Other federal conscience clauses reach services unconnected to the abortion procedure itself to encompass peripheral activities, such as training or referrals. E.g., 42 U.S.C. § 238n(a) (1) (2006).

¹⁹⁵ See Greenawalt, *supra* note 192, at 60 ("I do not think everyone remotely connected to patients . . . should have a right of conscience to refuse based on the procedure the patient undergoes. The tie to the objectionable practice is too remote."). Professor Greenawalt's argument concerns those who would *not* have qualified for protection in his view, but he may not intend "patient care" to be a requisite for protection for all objectors.

both *Danquah v. University of Medicine & Dentistry of New Jersey* and *Cenzon-DeCarlo v. Mount Sinai Hospital*, described in the Introduction, contend that a nurse “assist[s] with the abortion [and therefore is entitled to protection] even if [he or she is] taking down [a] name, holding a patient’s hand during the procedure, or walking them to the door.”¹⁹⁶

Certainly, ADF’s test reaches too far. As with the religious objections to same-sex marriage discussed above, not every person who has contact with a patient seeking abortion services actually facilitates the objectionable procedure. For example, the attendant who wheels the patient to the hospital entrance for curbside pick-up does this for *any* patient who needs this assistance. There is nothing unique to the abortion procedure that the attendant makes possible through her work. Contrast this with removing the remains of a fetus after a dilation and extraction or prepping the operating room for the abortion procedure itself—in both cases, the procedure could not happen without the specific services described.¹⁹⁷

As these examples make clear, providers can facilitate an abortion without significant patient contact. Likewise, a provider can have significant personal contact with a patient and still not facilitate an abortion. Thus, the operating room technician who ordinarily uses an autoclave to sterilize instruments would be able to claim an exemption from sterilizing a particular batch of instruments used only in abortion procedures, but he would not be able to object to sterilizing instruments for other surgeries. Similarly, a technician who disposes of medical waste could claim an exemption for refusing to dispose of the remains from an abortion, but not for refusing to dispose of remains per se.

The *Cenzon-DeCarlo* case offers a useful illustration of what would count as assistance—and thus receive protection—and what would not. In *Cenzon-DeCarlo*, the clinical nurse manager who was responsible for “facilitating the flow” of the hospital’s daily surgeries, testified that Cenzon-DeCarlo’s supervisor offered to allow Cenzon-DeCarlo to leave the operating room during the abortion procedure.¹⁹⁸ The hospital, however, would require Cenzon-DeCarlo “to perform her pre-operative job

¹⁹⁶ Seth Augenstein, *12 Nurses Accuse UMDNJ of Forcing Them to Assist in Abortion Cases Despite Religious and Moral Objections*, STAR-LEDGER (Newark, N.J.) (Nov. 14, 2011, 8:11 PM), http://blog.nj.com/ledgerupdates_impact/print.html?entry=/2011/11/12_nurses_accuse_umdnj_of_forc.html; see Stein, *supra* note 29; see also *supra* notes 31–32 and accompanying text (discussing *Danquah* and *Cenzon-DeCarlo*).

¹⁹⁷ See Gillian Flett & Allan Templeton, *Induced Abortion*, in DEWHURST’S TEXTBOOK OF OBSTETRICS AND GYNECOLOGY 95 (Keith Edmonds ed., 8th ed. 2012).

¹⁹⁸ Affidavit of Maura Carpo 1–3, *Cenzon-DeCarlo v. Mount Sinai Hosp.*, No. 10237-10 (N.Y. Sup. Ct. Feb. 7, 2011).

duties because [the hospital] had not been able to locate a replacement for [her] and the physician made clear that the patient's life was at risk."¹⁹⁹ The issue of whether anyone else could perform Cenzone-DeCarlo's services remains contested, and presumably will figure prominently in any trial.²⁰⁰ Under the test articulated above, Cenzone-DeCarlo's pre-operative procedures in preparation for a second-trimester abortion would clearly constitute "assistance." Nonetheless, as explained in Part V below, accommodations for religious objectors should be qualified by hardship to the patient.²⁰¹

The pressure to limit the scope of "assistance" stems precisely from the desire to avoid hardships on patients, employers, coworkers, and others that might be created by an unbounded exemption. The qualified hardship exemption illustrates, however, that there are more direct ways to satisfy this important, overriding objective.²⁰² A number of states, in fact, have recognized the possibility of hardships for patients and raised the bar for objecting to assistance with abortion services—which states are free to do because the Church Amendment does not preempt this entire area of law. For example, Iowa law provides that "[a]n individual . . . shall not be required against that individual's religious beliefs or moral convictions to perform, assist, or participate in such procedures" unless "necessary to save the life of a mother."²⁰³ Likewise, South Carolina law provides that "[n]o private or nongovernmental hospital or clinic shall be required to . . . permit their facilities to be utilized for the performance of abortions," but may not "refuse an emergency admittance."²⁰⁴

A number of common sense devices can also reduce dislocations to patients and others. Making objectors disclose *ex ante* any objections in writing would both eliminate the possibility of unfair surprise to those seeking services and give employers an opportunity to staff

¹⁹⁹ *Id.* at 3.

²⁰⁰ See *supra* notes 31–32 and accompanying text (discussing *Danquah*).

²⁰¹ See *infra* notes 247–288 and accompanying text.

²⁰² See Thaddeus Mason Pope, *The Legal Column: Conscientious Objection by Health Care Providers*, LAHEY CLINIC J. MED. ETHICS, Winter 2011, at 4, 4 (discussing the "evolving non-uniform patchwork of [state] laws" protecting conscientious exemptions and identifying trends).

²⁰³ IOWA CODE ANN. § 146.1 (West 2005); see also MD. CODE ANN., HEALTH-GEN. § 20-214 (LexisNexis 2009) (no person shall be required to perform an abortion, except when it may cause "death or serious physical injury or serious long-lasting injury to the patient" or when it would be "contrary to the standards of medical care"); MO. ANN. STAT. §§ 188.205, 188.210, 188.215 (West 2011) (providing that public employees need not perform abortions except when "necessary to save the life of the mother").

²⁰⁴ S.C. CODE ANN. § 44-41-40 (2002).

around the objector.²⁰⁵ Disclosure *ex ante* would serve an important screening function as well—separating individuals with deeply held objections from those with less sincere or more ambivalent feelings.

The likelihood of hardships could be reduced by limiting the ability to object, as Title VII does, to only those situations in which an employee's objections would not render her "unable to perform a substantial proportion of the duties of a particular position."²⁰⁶ Kentucky and Pennsylvania make it unlawful to discriminate against an abortion objector when the health care facility is not operated exclusively for the purpose of performing abortions,²⁰⁷ but facilities that exist precisely to conduct abortions may elect not to hire and could legally discharge an abortion objector. Obviously, giving protections to abortion objectors inside an abortion clinic would cause real mayhem. In this way, states such as Kentucky and Pennsylvania have struck a workable balance between respecting the religious beliefs of objectors and ensuring the continued availability of abortion services. Policymakers in a range of contexts should strive to follow this example and minimize the likelihood of significant hardships to all parties.

²⁰⁵ See *infra* note 362 and accompanying text.

²⁰⁶ See *Haring*, 471 F. Supp. at 1178–84 (holding that the IRS violated Title VII's protections against religious discrimination when it refused to promote a Catholic IRS agent "solely" because he "refus[ed] to handle applications for exemptions from persons or groups which advocate abortion or other practices to which he objects," he objected to working on cases comprising a tiny fraction of the overall volume of his work, and the IRS could have staffed around the agent without any undue hardship).

²⁰⁷ The Kentucky statute states:

It shall be an unlawful discriminatory practice for . . . [a]ny public or private agency, institution or person . . . [to] discriminate against any applicant for admission thereto or any physician, nurse, staff member, student or employee thereof, on account of the willingness or refusal . . . to perform or participate in abortion or sterilization by reason of objection thereto on moral, religious or professional grounds, or because of any statement or other manifestation of attitude by such person with respect to abortion or sterilization *if that health care facility is not operated exclusively for the purposes of performing abortions or sterilizations.*

KY. REV. STAT. ANN. § 311.800(5)(c) (LexisNexis 2001) (emphasis added). The Pennsylvania statute uses similar language. See 18 PA. CONS. STAT. ANN. § 3213(d) (West 2000) ("*Except for a facility devoted exclusively to the performance of abortions, no medical personnel or medical facility, nor any employee, agent or student thereof, shall be required against his or its conscience to aid, abet or facilitate performance or an abortion or dispensing of an abortifacient . . .*" (emphasis added)).

IV. FOURTH STICKING POINT: NO ONE IS BEING ASKED TO DO ANYTHING SO NO ONE NEEDS PROTECTION

Some assert that laws recognizing new civil rights do not need religious liberty guarantees because they do not require religious objectors to do any particular thing. For example, White House press secretary Jay Carney has said that the coverage mandate “does not signal any change at all in the administration’s policy on conscience protections” because it “does not direct an individual to do anything.”²⁰⁸

Like Carney, legislators have expressed genuine confusion about how same-sex marriage can trigger a threat to religious liberty, asking for:

[C]oncrete examples . . . that would justify anything along the lines of this exemption. . . . I’m finding this very amorphous, you know, just understanding what the concern is, you’ve got to concretize the concern to get my attention on this. Otherwise I think we’re just, kind of, thinking in kind of an airy fairy way about possible problems and I want to know what the serious things are that you are, that you prompt us to consider this.²⁰⁹

The fallacy of the notion that no one will be asked to do anything that would burden them is clearest in the same-sex marriage context. It overlooks a stream of advice to government officials and employees that they must serve all members of the public, even when another willing provider can do so immediately. After Massachusetts recognized same-sex marriage, the chief counsel to then-Governor Mitt Romney told the state’s justices of the peace that they must “follow the law, whether you agree with it or not.”²¹⁰ One linchpin of that law is Massa-

²⁰⁸ See January Press Briefing, *supra* note 17.

²⁰⁹ *E.g.*, *Hearing on D.C.’s Same-Sex Marriage Bill*, *supra* note 40, at 7:29:55 (statement of Councilmember Jim Graham). Professors Ira Lupu and Robert Tuttle make a similar claim as to government officials: “We have discovered no law on the question whether a Justice of the Peace or other official authorized to officiate is under a statutory duty to perform marriages when requested, and we expect no such specific duty exists.” See Lupu & Tuttle, *supra* note 46, at 294.

²¹⁰ Katie Zezima, *Obey Same-Sex Marriage Law, Officials Told*, N.Y. TIMES, Apr. 26, 2004, at A15. In Massachusetts, some justices of the peace had previously announced that they would resign if forced to perform same-sex marriages. Kathleen Burge, *Justices of the Peace Confront Gay Marriage*, BOS. GLOBE, Apr. 18, 2004, at B1; see also 158 CONG. REC. E1370 (daily ed. Aug. 1, 2012) (statement of Rep. Laura Richardson) (“Simply put, religious freedom requires religiously affiliated employers to obey the law rather than to become a law unto themselves.”). Although this is a common refrain in discussions of whether to enact religious lib-

chusetts' statute forbidding discrimination on the basis of sexual orientation, which subjects violators to as much as \$50,000 in civil fines.²¹¹

Similarly, in the wake of the Iowa Supreme Court's 2009 same-sex marriage decision, *Varnum v. Brien*,²¹² the Iowa attorney general told county recorders:

We expect duly-elected county recorders to comply with the Iowa Constitution as interpreted unanimously by the Iowa Supreme Court. . . . Our country lives by and thrives by the rule of law, and the rule of law means we all follow the law as interpreted by our courts—not by ourselves. . . . Recorders do not have discretion or power to ignore the Iowa Supreme Court's ruling. . . . All county recorders in the state of Iowa are required to comply with the *Varnum* decision following issuance of procedendo from the Supreme Court, and to issue marriage licenses to same sex couples in the same manner as licenses issued to opposite gender applicants.²¹³

As if this were not emphatic enough, the attorney general added: "if necessary, we will explore legal actions to enforce and implement the Court's ruling, working with the Iowa Dept. of Public Health and county attorneys."²¹⁴

Similarly, on the heels of New York's same-sex marriage law, the Office of Vital Records of the New York State Department of Health, in an informational memorandum to town and city clerks, told clerks that "[u]nder New York State Law the town or city clerk must provide a license to an applicant who meets all marriage requirements for New York State. It is a misdemeanor violation if the clerk refuses to do so for any reason."²¹⁵ These unmistakable messages from the executive de-

erty protections, it is not helpful to say that an objector must follow the law when the dialogue is about what the law should be.

²¹¹ See MASS. GEN. LAWS ch. 151B, § 5(c) (2010) (imposing such a fine on those who have "been adjudged to have committed 2 or more discriminatory practices during the 7-year period ending on the date of the filing of the complaint").

²¹² 763 N.W.2d 862, 907 (Iowa 2009) (holding that an Iowa statute defining marriage as between a man and a woman violated the equal protection rights of same-sex couples under the Iowa Constitution).

²¹³ Statement of Tom Miller, Iowa Att'y Gen., County Recorders Must Comply with Supreme Court's *Varnum* Decision (Apr. 21, 2009), available at http://www.state.ia.us/government/ag/latest_news/releases/apr_2009/Marriage_Stmnt.html.

²¹⁴ *Id.*

²¹⁵ Informational Memorandum to New York State Town and City Clerks, Office of Vital Records, N.Y. State Dep't of Health (July 13, 2011), available at http://site.pfaw.org/pdf/Jordan_Belforti_NY_Marriage.PDF; see also Dan Wiessner, *New York Town Clerk Quits*

partments of Iowa and New York left little doubt about local marriage clerks' new obligations in those states.

Government employees and officials believe they are at risk. At least one Iowa magistrate, authorized by law to preside over weddings,²¹⁶ has stopped performing marriages.²¹⁷ Although some judges believe the decision to preside over weddings is entirely a "discretionary function," a spokesperson for Iowa's Attorney General's office cautioned that "judges and magistrate judges have discretion whether they choose to participate in wedding ceremonies [but i]f they do, they should certainly do so without bias or prejudice, as per the Code of Judicial Conduct."²¹⁸ In Massachusetts, several justices of the peace said they would resign because no exemption was available, and at least one did so.²¹⁹ In New York, two clerks resigned in advance of the law's effective date rather than violate their religious beliefs.²²⁰

In a case that has received national attention after it was first profiled in the *New York Times*, the town clerk for Ledyard, New York, Rose Marie Belforti, assigned the task of issuing marriage licenses to a deputy clerk, who would issue the licenses by appointment, rather than as a walk-in service.²²¹ Belforti, a "self-described Bible-believing Christian," instituted the new process saying:

over Gay Marriage License, REUTERS, July 12, 2011, <http://www.reuters.com/article/2011/07/12/us-gaymarriage-newyork-resignation-idUSTRE76B7BJ20110712> (quoting Governor Andrew Cuomo as saying, "When you enforce the laws of the state, you don't get to pick and choose the laws").

²¹⁶ See IOWA CODE ANN. § 595.10(1) (West 2001 & Supp. 2011).

²¹⁷ See Kilian Melloy, *Iowa Magistrate to Stop Performing Marriages*, EDGE BOSTON (Apr. 23, 2009), <http://www.edgeboston.com/index.php?ch=news&sc=&sc2=news&sc3=&id=90310>.

²¹⁸ See *id.* (quoting a spokesperson for Iowa's Office of the Attorney General).

²¹⁹ See Emily Shartin, *Clerks in Suburbs Ready for May 17*, BOS. GLOBE, May 13, 2004, at A1 (reporting that a Bellingham, Massachusetts town clerk planned to resign her post as justice of the peace "because she fe[lt] 'uncomfortable' about the prospect of performing same-sex marriages"); Steve Inskeep, *Mass. Justice of the Peace Resigns over Gay Marriage*, NPR (May 14, 2004), <http://www.npr.org/templates/story/story.php?storyId=1896321> (indicating that a Charlton, Massachusetts justice of the peace "chose to resign her post rather than perform gay marriages").

²²⁰ See Efreem Graham, *Town Clerks Bullied over NY Gay Marriage Law*, CHRISTIAN BROADCAST. NETWORK (Nov. 7, 2011), <http://www.cbn.com/cbnnews/us/2011/November/Town-Clerks-Bullied-over-NY-Gay-Marriage-Law/> (quoting one clerk as saying, "I'd like to see [clerks] protected. . . . I think they should have a right to their religious beliefs, their biblical beliefs. . . . [T]hey should be able to stay in the office and just appoint someone else to do the job. It's a very small percentage of work in a rural community").

²²¹ See Thomas Kaplan, *Rights Collide as Town Clerk Sidesteps Role in Gay Marriages*, N.Y. TIMES, Sept. 28, 2011, at A1.

For me to participate in the same-sex marriage application process I don't feel is right. . . . God doesn't want me to do this, so I can't do what God doesn't want me to do, just like I can't steal, or any of the other things that God doesn't want me to do.²²²

Not surprisingly, the same-sex couple who presented for a marriage license on August 30, 2011, Katie Carmichael and Deirdre DiBiaggio, chafed at being put off to a later date, saying that “[s]eparate but equal is not equal. . . . We do not want to have to go in there on another day and be treated like a second-class citizen.”²²³ Later news reports suggest that the office—which serves a population of 1900 people, is open nine hours a week,²²⁴ and “issues fewer than seven marriage licenses a year”—now issues all marriage licenses by appointment.²²⁵ People for the American Way, together with attorneys at Proskauer Rose LLP, have threatened suit on behalf of Carmichael and DiBiaggio, arguing that “[p]ublic officials can't pick and choose the laws they want to follow. . . . If a public official simply decides to shirk the obligations of her office, then she should resign and be replaced by someone who will do the job and carry out state law.”²²⁶ To date no suit appears to have been filed. As explained more fully below, the claim that government employees must perform all services offered by a government office conflates the public's legitimate claim to receive the service from the state with a claimed entitlement to receive it from *each* employee of the office.²²⁷

²²² See *id.*

²²³ See Tyler Kingkade, *New York Town Clerk Refuses to Let Same-Sex Couple Get Married*, HUFFINGTON POST (Sept. 15, 2011, 5:57 PM), http://www.huffingtonpost.com/2011/09/15/new-york-town-refuses-to-marry-gay-couple_n_964595.html (quoting Carmichael).

²²⁴ See Kaplan, *supra* note 221.

²²⁵ See Graham, *supra* note 220.

²²⁶ See Press Release, People for the American Way, PFAW Foundation Demands That NY Town Clerks End Marriage Discrimination (Sept. 12, 2011), *available at* <http://www.pfaw.org/press-releases/2011/09/pfaw-foundation-demands-ny-town-clerks-end-marriage-discrimination> (quoting the president of People for the American Way Foundation); see also Letter from James E. Gregory, Esq., Proskauer Rose LLP, to Mark Jordan, Ledyard Town Supervisor and Rose Marie Belforti, Ledyard Town Clerk (Sept. 9, 2011), *available at* http://site.pfaw.org/pdf/Jordan_Belforti_NY_Marriage.PDF.

²²⁷ New York law appears to authorize town clerks to delegate services to a deputy in certain instances:

[T]he clerk of any city with the approval of the governing body of such city is hereby authorized to designate, in writing filed in the city clerk's office, a deputy clerk, if any, and/or other city employees in such office to receive applications for, examine applications, investigate and issue marriage licenses in the absence or inability of the clerk of said city to act, and said deputy and/or

Countries with a longer experience with same-sex marriage have also witnessed resignations and firings over the question of what duty is owed to same-sex couples.²²⁸ Although the laws governing in each jurisdiction surely differ in material ways, such resignations and firings provide further evidence that the law cannot simply remain silent on the question of duties.

The claim that “no one has to do anything” also overlooks the existing nondiscrimination statutes in every state that has embraced same-sex marriage, whether by legislation or judicial decision.²²⁹ Many of these state antidiscrimination laws contain some religious liberty protections.²³⁰ Yet, where statutes prohibiting sexual orientation discrimination do not contain religious liberty accommodations, they have been used to fine a photographer who refused to photograph weddings²³¹ and to sue a Methodist association that refused to open its fa-

employees so designated are hereby vested with all the powers and duties of said city clerk relative thereto.

N.Y. DOM. REL. LAW § 15(3) (McKinney 2010).

²²⁸ See Wilson, *supra* note 46, at 324–25 (chronicling resignations in Canada, dismissals in the Netherlands, and disciplinary actions against employees in the United Kingdom).

²²⁹ See, e.g., CONN. GEN. STAT. ANN. § 46a-81c (West Supp. 2011) (employment); D.C. CODE § 2-1402.11 (LexisNexis 2012) (employment); D.C. CODE § 2-1402.21 (housing); D.C. CODE § 2-1402.31 (public accommodations); D.C. CODE § 2-1402.41 (educational institutions); IOWA CODE ANN. § 216.6 (West 2005) (employment); MASS. GEN. LAWS ch. 151B, § 4 (2010) (employment); N.H. REV. STAT. ANN. § 354-A:6 (2009) (employment); VT. STAT. ANN. tit. 21, § 495 (2009 & Supp. 2011) (employment).

²³⁰ Of the twenty states with laws prohibiting discrimination on the basis of sexual orientation, eighteen provide exemptions for religious institutions. See Joan Frawley Desmond, *Same-Sex Marriage Bill and Religious Freedom*, CATHOLIC (Apr. 13, 2009, 8:57 AM), http://www.thecatholic.com/the_catholic/2009/04/mesex-marriage-bill-religious-freedom.html (quoting a Becket Fund study). The remaining two states, Hawaii and Wisconsin, have broad prohibitions on sexual orientation discrimination with no exemption for religious organizations. See HAW. REV. STAT. § 378-2 (2010 & Supp. 2011); WIS. STAT. ANN. § 111.31 (West Supp. 2011).

²³¹ See Sara Israelsen-Hartley, *Colliding Causes: Gay Rights and Religious Liberty*, DESERET NEWS (Feb. 12, 2012, 12:09 AM), <http://www.deseretnews.com/article/print/700224421/Gay-Liberty.html>; see also Hagerty, *supra* note 58. A suit arising from a photographer's denial of service to a same-sex couple under New Mexico's Human Rights Act is currently percolating through the New Mexico courts. Recently, the New Mexico Court of Appeals rejected the photographer's argument that the New Mexico State Constitution required a religious exemption to the state's Human Rights Act. Further, the court dismissed the photographer's claim that the Human Rights Act compelled speech under the First Amendment. *Elane Photography v. Willock*, No. 30,203, at 11 (N.M. Ct. App. May 31, 2012), available at <http://www.nmcompcomm.us/nmcases/nmca/slips/CA30,203.pdf>. The court reasoned:

The [New Mexico Human Rights Act] regulates Elane Photography's conduct in its commercial business, not its speech or right to express its own views about same-sex relationships. As a result, Elane Photography's commercial

cilities to same-sex civil union ceremonies.²³² Antidiscrimination statutes have provided a vehicle for these challenges, raising the question of whether objections to same-sex marriage are like any other form of discrimination against lesbians and gays.²³³

Many laws prohibiting discrimination on the basis of race and other prohibited classifications date to the 1960s and 1970s, long before same-sex marriage was widely considered.²³⁴ These laws largely address commercial services, like hailing taxis, ordering burgers, and leasing apartments, for which it is hard to imagine that a refusal to serve another individual can reflect anything other than animus toward that individual.²³⁵

Refusals to assist a same-sex marriage are different in character, however—they can stem from something other than anti-gay animus.²³⁶

business conduct, taking photographs for hire, is not so inherently expressive as to warrant First Amendment protections. The conduct of taking wedding or ceremonial photographs, unaccompanied by outward expression of approval for same-sex ceremonies, would not express any message from Elane Photography.

Id.

Finally, the appellate court rejected the claim that the state's RFRA could be used as a defense because the RFRA was intended to limit governmental intrusions into religious freedom and not suits between private parties. *See id.*

²³² Jill P. Capuzzo, *Church Group Complains of Pressure over Civil Unions*, N.Y. TIMES, Aug. 14, 2007, at B4; *see* Hagerty, *supra* note 58.

²³³ *E.g.*, Flynn, *supra* note 46, at 251–54.

²³⁴ The Netherlands first recognized same-sex marriage in 2001, but same-sex marriage was not accepted in any U.S. jurisdiction until 2004, when Massachusetts began issuing marriage licenses to same-sex couples. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 MINN. L. REV. 1184, 1229 n.191 (2004) (noting the genesis of same-sex marriage legislation in Europe); Carolyn Lochhead, *Pivotal Day for Gay Marriage in U.S. Nears*, S.F. CHRON., May 2, 2004, at A1.

²³⁵ *See, e.g.*, 42 U.S.C. § 3604 (2006) (prohibiting discrimination in the sale or rental of a dwelling).

²³⁶ This is not to say that every objection will be made in good faith. *See supra* notes 110–207 and accompanying text (discussing tests for the sincerity of claims). Although some faith traditions object to homosexual sex, an objection to facilitating a same-sex marriage on this ground alone would *not* be protected under the model provision in Appendix B, *infra*. The model provision, by its very terms, would protect refusals to “solemniz[e] or celebrat[e] [] any marriage” only when doing so would force one to “violate their sincerely held religious beliefs.” *See infra* app. B (emphasis added). All civil rights laws prohibit covered entities from discriminating on certain bases yet allow them to act on others. As a result, courts often must parse legitimate, permitted grounds from illegitimate ones, taking into account all surrounding circumstances. *Cf.* Ash v. Tyson Foods, 664 F.3d 883, 898 (11th Cir. 2011) (examining the possible legitimate and illegitimate reasons for an employer's failure to promote an African American employee).

For many people, marriage is a religious institution and wedding ceremonies are a religious sacrament.²³⁷ For them, assisting with marriage ceremonies has a religious significance that ordering burgers and hailing taxis simply do not have. Many of these people have no objection generally to providing services to lesbians and gays, but they would object to facilitating a marriage directly—just as some religious believers would object to facilitating an interfaith or second marriage.²³⁸ Without explicit protection in the antidiscrimination or same-sex marriage law, many will be faced with a cruel choice: your conscience or your livelihood.

The penalties for violating antidiscrimination laws are sobering. In Massachusetts, individuals violating the nondiscrimination statute can be fined up to \$50,000.²³⁹ In Connecticut, business owners who violate the statute may be found guilty of a Class D misdemeanor, which can lead to thirty days in jail.²⁴⁰ In the District of Columbia, the penalties for violation of the Human Rights Act include liability for all of the typical money damages in civil cases, including damages for emotional distress and attorney's fees.²⁴¹ The defendant can also be forced to pay stiff civil penalties to the city: \$10,000 or less for the first violation, \$25,000 or less for a second offense in a five-year period, or \$50,000 or less for a third offense in a seven-year period.²⁴² These are harsh penalties in today's economy, especially the threat of private lawsuits.

Although exemptions seek to protect bona fide objections to facilitating a marriage, some may seek to take advantage of such exemptions for malign reasons. The fact that an exemption creates the possibility of misuse by some does not condone such misuse. More importantly, as Parts II and III of this Article explain, sincerity tests and information-forcing rules serve an important screening function and should discourage bad faith attempts to seek the cover of an exemption. *See supra* notes 110–161, 219 and accompanying text.

²³⁷ *See* Charles Reid, *Marriage: Its Relationship to Religion, Law, and the State*, in *EMERGING CONFLICTS*, *supra* note 30, at 157.

²³⁸ *See supra* note 68 (discussing religious objections to interfaith marriage).

²³⁹ *See* MASS. GEN. LAWS ch. 151B, § 5(c) (2010). The law excludes social clubs, fraternal organizations, employers with less than six employees, and religious organizations if the challenged practice is in furtherance of religious doctrine or involves giving a preference to members of the organization. *Id.* § 1.

²⁴⁰ *See* CONN. GEN. STAT. ANN. § 46a-81d(b) (West Supp. 2011) ("It shall be a discriminatory practice . . . [t]o deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation . . . because of such person's sexual orientation or civil union status . . ."); H.B. 5145, 2012 Gen. Assemb., Reg. Sess. (Conn. 2012) (specifying jail sentences effective October 1, 2012). A public accommodation is "any establishment which caters or offers its services or facilities or goods to the general public." *Id.* § 46a-63.

²⁴¹ *See* D.C. CODE § 2-1403.13(a) (LexisNexis 2012).

²⁴² *See id.* § 2-1403.13(a) (1) (E-1).

Similarly, the parallel claim that the coverage mandate does not ask objectors to do anything also fails. Under the Obama administration's accommodation to religiously affiliated employers, employees receive the coverage as an adjunct to the insurance coverage the religious employer finances, making it part and parcel of the employer-provided coverage.²⁴³ Thus, the objector's act of providing the mandated insurance facilitates an action the objector views as gravely immoral—the forestalling or ending of a life.²⁴⁴ The penalties for failing to provide the underlying coverage—coverage without which the “free” but objectionable coverage cannot be obtained—are staggering. If the University of Notre Dame dropped its coverage for all employees rather than violate its religious convictions,²⁴⁵ under the regulations as they now stand and assuming no change in its number of employees, it would face an annual penalty of \$32,830,000, although it may nonetheless come out ahead financially, as Part VI explains.²⁴⁶

Furthermore, if no one will truly be asked to do anything, then it costs nothing to provide a specific religious liberty protection. If, however, someone will or may be asked to assist with an act that violates deeply held religious beliefs, then it is incumbent upon legislators to clarify whether individuals can step quietly aside.

V. FIFTH STICKING POINT: NO ONE SHOULD HAVE TO BEAR THE COST OF ANOTHER'S RELIGIOUS OBJECTION

In the fight over the coverage mandate, the American Civil Liberties Union (ACLU) pointedly maintained that “[r]eligious liberty does

²⁴³ See *supra* note 22–27 and accompanying text.

²⁴⁴ See Garvey et al., *supra* note 24, at 1 (“It is no answer to respond that religious employers are not ‘paying’ for this aspect of the insurance coverage.”).

²⁴⁵ Although some argue that institutions cannot have “beliefs,” institutions may be guided by institutional ethics that shape their internal character, culture, and mission. The Supreme Court addressed the free exercise rights of religious institutions in its 2012 decision in *Hosanna Tabor Evangelical Lutheran Church & School v. EEOC*, 132 S. Ct. 694, 706, 712 (2012) (concluding that “the Free Exercise Clause . . . protects a religious group’s right to shape its own faith and mission through its appointment[.]” of ministers, and noting that “[a]pplying the protection of the First Amendment to roles of religious leadership, worship, ritual, and expression focuses on the objective functions that are important for the autonomy of any religious group, regardless of its beliefs”). Some commentators argue that “[a] vibrant liberty of conscience requires morally distinct institutions, not just morally autonomous individuals,” and therefore that the state should recognize that institutions also have conscience claims. See ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE (2010); Robert K. Vischer, *Conscience and the Common Good: An Introduction*, 49 J. CATHOLIC LEGAL STUD. 293, 296 (2010).

²⁴⁶ See *infra* notes 343–355 and accompanying text (calculating penalties for failing to provide mandated health insurance under the ACA).

not mean the right to impose religious views on others. . . . Employers should not be able to impose their moral views about birth control on the women who work for them.”²⁴⁷ The same claim is made about same-sex marriage.²⁴⁸

For the most part, appropriately crafted exemptions need not ask same-sex couples to bear the cost of protecting others’ religious beliefs.²⁴⁹ The protections for individual objectors in government employment or commerce that I and others have proposed seek to balance two competing concerns—marriage equality and religious liberty.²⁵⁰

²⁴⁷ See Steve Mistler, *Groups Criticize Maine AG for Opposing Contraceptive Access*, ME. SUN J. (Feb. 22, 2012, 12:12 PM), <http://www.sunjournal.com/news/state/2012/02/22/groups-criticize-maine-ag-opposing-contraception-m/1158735> (quoting a representative of the ACLU of Maine); see also Written Statement of Laura W. Murphy, Dir., Wash. Legislative Office, & Sarah Lipton-Lubet, Policy Counsel, ACLU, to U.S. House of Representatives Subcommittee on Health, Committee on Energy & Commerce 1 (Nov. 2, 2011), available at http://www.aclu.org/files/assets/aclu_statement_for_11-2-11_health_subcomm_hearing.pdf (“Religious liberty does not come with the right to impose one’s faith on others.”).

²⁴⁸ See Wilson, *supra* note 46, at 319 n.3 (“[C]hurches should not get to push their beliefs onto their employees by denying benefits. There is no reason for the government to recognize a right to bigotry in civil matters.” (quoting seller11, Comment to Robin Fretwell Wilson, *A Marriage Equality Bill That Respects Religious Objectors*, WASH. POST (Nov. 1, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/26/AR2009102601653.html>) [hereinafter Wilson, *Marriage Equality Bill*]).

²⁴⁹ See *infra* notes 289–357 and accompanying text (discussing employee benefits).

²⁵⁰ The proposed protections do not, however, cabin the exemption for religious organizations. Instead, religious organizations would be permitted to refuse to “(1) provide services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization or celebration of any marriage; or (2) solemnize any marriage; or (3) treat as valid any marriage.” See *infra* app. B. In other words, religious organizations could choose not to provide benefits to spouses when recognizing any marriage that would force them to violate their religious beliefs. The argument for an unqualified exemption even as to benefits coverage—one of the thorniest and least intuitive issues facing legislators—is taken up in Part VI. See *infra* notes 289–357 and accompanying text. The model provision would also permit religious organizations to refuse to rent their space for receptions celebrating marriages that are not recognized by their faith traditions. It is possible that this unqualified exemption would create hardship for same-sex couples if, for example, there were no other spaces available in the marketplace, although it seems very unlikely that same-sex couples would be unable to find another space. Where a religious organization occupies a monopoly position in the marketplace, however, this pivotal position would justify qualifying the right to object even for religious organizations. See Alta Charo, *The Celestial Fire of Conscience—Refusing to Deliver Medical Care*, 352 NEW ENG. J. MED. 2471, 2473 (2005) (arguing that a health care provider’s claim of “unfettered right to personal autonomy while holding monopolistic control over a public good constitutes an abuse of the public trust,” and that health care providers who benefit from the monopolies created by state licensing systems have a corresponding collective obligation to provide services to all patients who seek them); Wilson, *supra* note 98, at 479–83 (arguing that any exemption for religiously affiliated adoption placement providers should be qualified if an absolute exemption would erect a significant barrier to a same-sex couple’s ability to adopt). With

A government official could refuse to solemnize a marriage *only if* another government official is promptly available and willing to do so without inconvenience or delay.²⁵¹ Under this construction, in an unavoidable contest between religious liberty and marriage equality, religious liberty must yield. Thus, no state official may ever act as a choke-point on the path to marriage. In the private commercial context, small business owners could say no because unlike government officials, they do not control access to the status of marriage.

The conditional nature of this protection is by deliberate design: an absolute exemption for government employees or officials—unqualified by hardship²⁵²—could erect a roadblock to marriage for

respect to health care providers' collective obligation to serve all patients, Professor Alta Charo notes that the obligation:

does not mean that all members of the profession are forced to violate their own consciences. It does, however, necessitate ensuring that a genuine system for counseling and referring patients is in place, so that every patient can act according to his or her own conscience just as readily as the professional can.

Charo, *supra*, at 2473. Professor Charo acknowledges that although it may be difficult to strike such a balance, doing so “represent[s] the best effort to accommodate everyone and is the approach taken by virtually all the major medical, nursing, and pharmacy societies.” *Id.* This may occur with religiously affiliated hospitals that, for example, do not want to recognize the same-sex spouse of a patient for purposes of hospital visitation. As Part I documented, Catholic hospitals frequently do occupy a monopoly position in the marketplace, making these denials particularly burdensome, leading to significant and deserved public outcry. *See supra* notes 106–109 and accompanying text. This public backlash precipitated new federal regulations that address this “very tender and sensitive topic” for both sides. *See Rogers, supra* note 35 (quoting Mitt Romney). The regulations, which govern all Medicare- and Medicaid-participating hospitals, allow patients to decide for themselves who they want to visit during their hospital stay, including same-sex partners. *See* 42 C.F.R. §§ 482.13(h), 485.635(f) (2012). The new regulations give the force of law to recommendations made by President Barack Obama in his April 15, 2010 Presidential Memorandum. *See Respecting the Rights of Hospital Patients to Receive Visitors and to Designate Surrogate Decision Makers for Medical Emergencies*, 75 Fed. Reg. 20,511, 20,511–12 (Apr. 15, 2010) (prohibiting hospitals from denying visitation privileges on the basis of race, color, national origin, religion, sex, sexual orientation, gender identity, or disability).

²⁵¹ *See infra* app. B.

²⁵² Several states provide illustrative hardship restrictions. *See, e.g.*, DEL. CODE ANN. tit. 24, § 1790 (2011) (prohibiting the termination of a pregnancy unless the pregnancy: “(1) is likely to result in the death of the mother; (2) [t]here is substantial risk of . . . deformity or mental retardation; (3) [t]he pregnancy resulted from . . . [i]ncest, or . . . rape . . . ; [or] (4) [c]ontinuation of the pregnancy would involve substantial risk of permanent injury to the . . . mother”); MD. CODE ANN., HEALTH–GEN. § 20-214 (LexisNexis 2009) (providing that no person shall be required to perform an abortion or refer a patient to another for an abortion, except when failure to refer the patient would reasonably be determined as “[t]he cause of death or serious physical injury or serious long-lasting injury to the patient” or if the failure was “contrary to the standards of medical care”); MO. ANN. STAT. §§ 188.205, 188.210, 188.215 (West 2011) (mandating that public employees shall

same-sex couples at least some of the time.²⁵³ For example, an accommodation that absolutely exempts clerks from processing a marriage license application would hobble a couple's access to marriage in a number of foreseeable circumstances. This might occur when a solitary clerk is available within a twenty-mile radius and he or she objects for religious reasons to facilitating a same-sex marriage.²⁵⁴ An absolute roadblock would also be erected when an otherwise willing clerk is unavailable due to illness or other reason, leaving no one else to assist the couple. Our proposed exemption forestalls such hardships to same-sex couples.

As with any rule that seeks to balance two separate interests, the proposed hardship exemption will involve some line drawing—specifically, what will count as “promptly,” or as “inconvenience” or “delay.” Such line drawing could be accomplished in the legislative process, which would permit states to make choices that reflect the facts on the ground in that state—for instance, how many clerks process the necessary paperwork in any given office.²⁵⁵ Legislators would be wise to de-

not perform abortions, except when “necessary to save the life of the mother”); S.C. CODE ANN. §§ 44-41-40, 44-41-50 (2002) (mandating that “[n]o private or nongovernmental hospital or clinic shall be required to . . . permit their facilities to be utilized for the performance of abortions . . . *provided*, that no hospital or clinic shall refuse an emergency admittance”).

²⁵³ Many commentators are rightly concerned about conferring upon religious objectors an absolute, unqualified exemption to facilitating same-sex marriages. For instance, Professors Ira Lupu and Robert Tuttle observe that:

[T]he political community has a legitimate interest in ensuring that all people have equal access to publicly available goods and services, whether provided by the state, commercial entities, or others. This interest primarily arises from concern about those who are *excluded from such benefits*. *Exclusion* may imperil health and safety, limit opportunities for personal development, deny political and social equality, or impose psychic distress. State policies protecting against such *exclusion* also express the political community's concerns about its own character and experience, because such *exclusion may result in segregation and conflict*.

See Lupu & Tuttle, *supra* note 46, at 280–81 (emphasis added). Because my colleagues and I share this concern, the protections we propose would not give an absolute exemption for government employees or commercial providers.

²⁵⁴ Such considerations are contextually sensitive and might vary considerably among specific state regulations. See, e.g., N.J. STAT. ANN. 37:1-3 (West Supp. 2012) (“[A] marriage or civil union license shall be issued by the licensing officer in the municipality in which either party resides or, if neither party is a resident of the State, in the municipality in which the proposed marriage or civil union is to be performed.”).

²⁵⁵ See Wilson, *supra* note 46, at 335–39 (presenting empirical evidence about the operation of clerks' offices in Massachusetts, including the number of clerks and same-sex marriage license applications, suggesting that same-sex marriage licenses constitute a min-

cide to explicitly define such terms in any same-sex marriage legislation, as they routinely do in other statutes, rather than leaving it to the courts to construe those terms.²⁵⁶ That said, asking same-sex couples to wait any significant amount of time for a license that heterosexual couples would receive immediately would not be “prompt.”

The protection we propose will strike many religious objectors as cold comfort. In a head-to-head contest between religious liberty and marriage equality, religious liberty yields under this construction. Restricting the ability to object to only those situations in which no hardship for same-sex couples would result is principled: the state should not confer the right to marry with one hand and then take it back with the other by enacting broad, unqualified religious objections that could operate to bar same-sex couples from marrying.²⁵⁷ Although the proposed protection does not help every objector in every instance, the exemption still has value. As I have argued elsewhere, a hardship exemption will likely allow the vast majority of objectors to step aside.²⁵⁸

Some will ask why same-sex couples should ever have to experience any dislocation, however slight or remote. A common refrain is that religious objectors in government service should do all of their job or resign.²⁵⁹ This stance conflates the public receipt of a service offered by the state with the receipt of that service from each and every employee in the office who is available to do it. Same-sex couples clearly

iscule part of the workload for state clerk offices, and thus that staffing around religious objections would pose negligible costs).

²⁵⁶ See *infra* notes 358–365 and accompanying text (discussing promptness and the virtues of making accommodations as invisible as possible so that same-sex couples “never stand in another line”).

²⁵⁷ See Laycock, *supra* note 169, at 200 (“[A hardship qualification on religious objection] is inevitable in the governmental and commercial sectors. Religious dissenters can live their own values, but not if they occupy choke points that empower them to prevent same-sex couples from living *their* own values. If the dissenters want complete moral autonomy on this issue, they must refrain from occupying such a choke point.”).

²⁵⁸ See Wilson, *supra* note 46, at 335–39 (arguing that few cases of hardship to same-sex couples would actually arise).

²⁵⁹ See Letter from James E. Gregory, *supra* note 226, at *2 (“[W]e fully expect the Town Board to direct Ms. Belforti to either perform her essential duties, including the issuance of marriage licenses to eligible applicants whether same sex or opposite sex, or to resign immediately.”). One D.C. Council member expressed the idea this way:

If [an objector is a clerk] who chose[s] not to provide [a] service that [she has] accepted the job to provide but . . . still want[s] an entire salary as if [she] were providing 100% of the service, [then she is asking for] all of the benefits of the position [yet feeling] entitled to discriminate.

Hearing on D.C.’s Same-Sex Marriage Bill, *supra* note 40, at 6:57:55 (statement of Councilmember David Catania).

have the right to receive marriage licenses and all other services from the state, but they do not necessarily have a claim to receive the service from a particular public servant. Indeed, Title VII of the Civil Rights Act of 1964 imposes upon governmental employers a duty to accommodate an objecting employee if reasonably possible without undue hardship to the government, while also reasonably preserving the employee's employment status.²⁶⁰ Given Title VII's protections, it is simply insufficient to require that religious objectors "put up or shut up."

More fundamentally, this stance vilifies people who could not have known when they took their jobs that they would be asked to facilitate a same-sex marriage. A New York clerk who resigned "just one day before gay marriage became legal" took her position as a clerk thirteen years before, in 1998—three years before the Netherlands first recognized

²⁶⁰ See Wilson, *supra* note 46, at 348–59; see also *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776 (9th Cir. 1986) (noting that employment status includes compensation, conditions, terms, and privileges of employment). There are other problems with the "do-the-whole-job-or-get-out" approach. As a pair of cases involving claims for accommodation of employees in predictable administrative jobs illustrates, speculative predictions regarding possible future disruptions are not to be considered; instead, employers are to be guided by the facts on the ground. See *McGinnis v. U.S. Postal Serv.*, 512 F. Supp. 517, 524 (N.D. Cal. 1980); *Haring v. Blumenthal*, 471 F. Supp. 1172, 1182 (D.D.C. 1979). In its 1979 decision in *Haring v. Blumenthal*, the U.S. District Court for the District of Columbia noted:

"[U]ndue hardship" must mean present undue hardship, as distinguished from anticipated or multiplied hardship. Were the law otherwise, any accommodation, however slight, would rise to the level of an undue hardship because, if sufficiently magnified through predictions of the future behavior of the employee's co-workers, even the most minute accommodation could be calculated to reach that level.

471 F. Supp. at 1182. The best empirical evidence suggests, however, that allowing government employees to recuse themselves from facilitating same-sex marriages will cost the government and same-sex couples very little, if anything at all. See Wilson, *supra* note 46, at 335–39. Moreover, although accommodations for certain government employees who protect the public (like police officers and firefighters) have raised special difficulties and received special scrutiny in a string of cases from the U.S. Court of Appeals for the Seventh Circuit, at most these cases stand for the proposition that employees of "paramilitary" organizations responsible for public protection must check their consciences at the door. See *id.* at 349–58 (citing *Endres v. Ind. State Police*, 349 F.3d 922, 925–27 (7th Cir. 2003); *Rodriguez v. City of Chi.*, 156 F.3d 771, 775–80 (7th Cir. 1998); *Ryan v. U.S. Dep't of Justice*, 950 F.2d 458, 461 (7th Cir. 1991)). Patently, religious accommodations for employees of marriage licensure offices and other government employees who may object to facilitating same-sex marriages pose far less difficulty than accommodations for public protectors because these employees perform routine, predictable, easily staffed-around tasks. See *id.* at 349. Moreover, even in the public protector cases, which are the most hostile to the need for accommodations, public employers can and routinely do offer new assignments, transfers, and low-level work-arounds short of a new assignment, which allow the religious objector to step aside from services that violate deeply held religious beliefs. See *id.* at 354.

same-sex marriage and six years before same-sex marriage was recognized anywhere in the United States.²⁶¹

Like the New York clerk, many state employees in the United States began working for the government long before same-sex marriage was legally recognized anywhere. The Council of State Governments reports that many public sector employees have held their jobs for decades.²⁶² Many state employees are eligible for retirement.²⁶³ Generally, to be eligible for retirement, an employee must have worked for the state for a substantial length of time.²⁶⁴ Roughly one in every four or five employees working for state government in Iowa (17%), New Hampshire (22%), and Vermont (25%) qualified for retirement in 2002.²⁶⁵ There is no reason to think that clerks in state registrar offices or other employees as a group are more likely to be newcomers to the job than their counterparts.

Moreover, dismissal or resignation will likely be very costly for these employees. A job in the state licensure office pays well, and many long-time employees have built up retirement and other benefits that would be wiped out or significantly curtailed if they felt forced to exit rather than violate a religious conviction.²⁶⁶

Just as important as these very human costs to objectors is the fact that collisions will gradually become less and less prevalent. Resistance to recognition of same-sex marriage largely follows generational lines. In 2011, the UCLA Higher Education Research Institute annual national survey of college freshmen found that 71.3% of college freshmen supported same-sex marriage.²⁶⁷ In 2010, 53% of those surveyed between eighteen and twenty-nine supported same-sex marriage; 39%

²⁶¹ See Graham, *supra* note 220; see also *supra* note 234 (discussing the origin of same-sex marriage in the Netherlands and Massachusetts); see also Wilson, *supra* note 113, at 328–31 (offering a more extensive discussion of this issue).

²⁶² See JAMES B. CARROLL & DAVID A. MOSS, COUNCIL OF STATE GOV'TS, TRENDS ALERT: STATE EMPLOYEE WORKER SHORTAGE: THE IMPENDING CRISIS 17 (2002), available at <http://www.csg.org/knowledgecenter/docs/TA0210WorkShortage.pdf>.

²⁶³ See *id.* at 16 (providing data for some states that recognize same-sex marriage). Numbers for Massachusetts are not available. See *id.*

²⁶⁴ See Wilson, *supra* note 46, at 330 n.66 (discussing length of service requirements for retirement).

²⁶⁵ See CARROLL & MOSS, *supra* note 262, at 16. On average, state workers in Iowa had worked thirteen years by 2002, in New Hampshire nine years, and in Vermont eleven years—all more than a decade before same-sex marriage was recognized by their states. See *id.* at 17.

²⁶⁶ See Wilson, *supra* note 46, at 329–30.

²⁶⁷ JOHN H. PRYOR ET AL., HIGHER EDUC. RESEARCH INST. AT UCLA, THE AMERICAN FRESHMAN: NATIONAL NORMS FALL 2011, at 6 (2011), available at <http://heri.ucla.edu/PDFs/pubs/TFS/Norms/Monographs/TheAmericanFreshman2011.pdf>.

opposed it.²⁶⁸ Among older Americans fifty to sixty-four, 52% oppose it, with only 38% in support.²⁶⁹ This data suggests that conflicts over same-sex marriage rights will recede over time.²⁷⁰ As Professor Douglas Laycock has written, these conflicts will “gradually fade away, and nearly all the rest [of those who oppose same-sex marriage] will go silent, succumbing to the live-and-let-live traditions of the American people.”²⁷¹

In the commercial realm, our proposal gives more latitude to say “no” because the objector does not control access to the status of marriage. The wedding photographer and cake decorator are classic examples of commercial actors associated with marriage. Even the protection for these commercial actors is not unqualified, however. An objector in the stream of commerce may object only if a “substantial hardship” would not result.²⁷² This provision allows them to step aside only when other providers can do the job. Because same-sex marriage laws remain largely a “blue state” phenomenon, the number of refusals should be vanishingly small.²⁷³ As Professor Laycock has explained:

Few same-sex couples . . . will have to go far to find merchants, professionals, counseling agencies, or any other desired service providers who will cheerfully meet their needs and wants.

²⁶⁸ *Gay Marriage Gains More Acceptance*, PEW RESEARCH CTR. FOR PEOPLE & PRESS (Oct. 6, 2010), <http://pewresearch.org/pubs/1755/poll-gay-marriage-gains-acceptance-gays-in-the-military>. Forty-six percent of individuals thirty to forty-nine approved of same-sex marriage in 2010. *See id.* This group experienced the greatest shift in opinion favoring same-sex marriage rights—up from only thirty-nine percent in 2008. *See id.*

²⁶⁹ *See id.*; *see also* Robin Fretwell Wilson, *The Politics of Accommodation: The American Experience with Same-Sex Marriage and Religious Freedom*, in RELIGIOUS FREEDOM AND EQUALITY: EMERGING CONFLICTS IN NORTH AMERICA AND EUROPE (Timothy S. Shah ed., forthcoming 2013) (analyzing voter opinion in states that have yet to enact same-sex marriage statutes, as well as states that have enacted amendments banning same-sex marriage).

²⁷⁰ In perhaps one sign that same-sex marriage is decreasingly controversial and polarizing, a national poll conducted two weeks after President Obama’s endorsement of same-sex marriage revealed that the President’s stand had done little to affect public perceptions of him. *See* Julie Pace, *Obama Team Trumpets New Polling on Gay Marriage*, HUFFINGTON POST (May 23, 2012, 7:42 PM), <http://www.huffingtonpost.com/huff-wires/20120523/us-obama-gay-marriage>. Only seven percent of registered voters stated that President Obama’s open support for same-sex marriage raised concerns about supporting him, whereas sixty-two percent stated that his position did not make a difference to them. *See id.*

²⁷¹ *See* Letter from Douglas Laycock to Me. Governor John Baldacci, *supra* note 48, at 261.

²⁷² *See infra* app. B.

²⁷³ *See* FED. ELECTION COMM’N, FEDERAL ELECTIONS 2008: ELECTION RESULTS FOR THE U.S. PRESIDENT, U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 17 (2009), *available at* <http://www.fec.gov/pubrec/fe2008/federalections2008.pdf> (reflecting the “blue state” presidential electoral results in Connecticut, the District of Columbia, New Hampshire, New York, Vermont, and Washington).

And same-sex couples will generally be far happier working with a provider who contentedly desires to serve them than with one who believes them to be engaged in mortal sin, and grudgingly serves them only because of the coercive power of the law. Religious exemptions could also be drafted to exclude the rare cases where these suppositions are not true, such as a same-sex couple in a rural area that has reasonably convenient access to only one provider of some secular service. Such cases are no reason to withhold religious exemptions in the more urban areas where most of the people—and most of the same-sex couples—actually live.²⁷⁴

Of course, same-sex couples may experience inconveniences or dislocations under any exemption, even an exemption qualified by hardship.²⁷⁵ So why allow any dislocation? First, a qualified exemption “lowers the stakes” in the debate about same-sex marriage, where pub-

²⁷⁴ See Letter from Douglas Laycock to Me. Governor John Baldacci, *supra* note 48, at 261 (predicting that without religious accommodations, the number of people opposing same-sex marriage will increase); see also Berg, *supra* note 46, at 229 (noting that marketing surveys indicate that more than seventy-four percent of same-sex couples live in large urban areas).

²⁷⁵ One way to mitigate such dislocation is through information-forcing rules like those used with health care services. California law, for example, requires that any facility that does not offer abortion “on its premises shall post notice . . . in an area . . . that is open to patients and prospective admittees.” CAL. HEALTH & SAFETY CODE § 123420(c) (West 2012). This advance notice allows the patient to seek services knowing whether a provider is willing to provide such services. Information networks may also close knowledge gaps and ease dislocation. These information networks have been used to promote patient access to emergency contraceptives and to allow the patient to get emergency contraceptives without great dislocation, while allowing unwilling providers to live by their convictions. See Kyung M. Song, *Women Complain After Pharmacies Refuse Prescriptions*, SEATTLE TIMES, Aug. 1, 2006, at A5 (arguing that “with better information, the patient would obtain the service without hardship or inconvenience”); Comments from Nathan J. Diamant et al., Comments Submitted to the U.S. Dep’t of Health & Human Servs. with Regard to the Proposed Rescission of the “Conscience Regulation” Relating to Healthcare Workers and Certain Healthcare Services 4 (Apr. 7, 2009), available at http://www.ourradio.org/images/uploads/HHS_Conscience_Regulation_Comments.pdf (“[W]omen who have experienced difficulty in obtaining emergency contraceptives have encountered ‘search costs’ that would be eliminated with better information. Thus, the patient in one complaint filed with the Washington State Board of Pharmacy obtained [emergency contraceptives] less than an hour after the initial refusal took place.”).

Advance notice of refusals will likely satisfy no one in the same-sex marriage context, despite the fact that it would avert needless inconveniences. We would no more tolerate signs saying, “This photography shop does not photograph same-sex ceremonies” than we would tolerate “Irish Need Not Apply” signs. The promise and hope of antidiscrimination laws is that they will erase differences or the importance of differences, not accentuate them. Thus, the information gain comes at an unacceptably high price—a loss of dignity—which is explored in Part VII. See *infra* notes 358–365 and accompanying text.

lic opinion continues to be deeply divided.²⁷⁶ It preserves as much religious freedom as possible in a liberal society without significantly encroaching on others—a goal we should generally strive for, especially when the costs to the public are cabined.²⁷⁷ A qualified exemption also provides “elbow room” for citizens with widely divergent views to live together in a pluralistic society.

As Professor Laycock notes, “[t]he larger problem for same-sex couples is the insult, the pointed reminder that some fellow citizens vehemently disapprove of what they are doing. But same-sex couples know that anyway, and the American commitment to freedom of speech ensures that they will be reminded of it from time to time.”²⁷⁸ The fact that the government should not violate deeply held religious beliefs in order to protect others from insult does not mean that the government should not be concerned about whether same-sex couples are subjected to insult.²⁷⁹

Precisely to minimize any offense to same-sex couples, the process for accommodating religious objectors should make any objection as invisible as possible. As the next Part explains, this is achievable if the objector works in a large private-sector organization or government office.²⁸⁰ The couple asked by the Ledyard, New York town clerk to return at a later time to secure a marriage license from a deputy rightly

²⁷⁶ See, e.g., William N. Eskridge, Jr., *Noah's Curse and Paul's Admonition: How the Civil Rights Revolution Helps Us Understand Recent Clashes Between Religious Liberty and Gay Equality*, in ANDREW KOPPELMAN & GEORGE W. DENT, JR., *MUST GAY RIGHTS CONFLICT WITH RELIGIOUS IDENTITY?* (forthcoming 2012) (on file with author). Professor William Eskridge notes that:

[J]udges are incompetent to resolve these issues where the nation is closely but intensely divided but they can and ought to *lower the stakes* of such primordial politics. Lowering the stakes means that judges should not prematurely constitutionalize fundamental issues where the nation is not settled; on the other hand, judges can sometimes ameliorate local conflicts that have escalated.

Id.; see Robin Fretwell Wilson, *Same-Sex Marriage Law Lacks Religious Protection*, BANGOR DAILY NEWS (Oct. 16, 2009, 8:41 PM), <http://bangordailynews.com/2009/10/16/opinion/samesex-marriage-law-lacks-religious-protection> (arguing that religious liberty exemptions in same-sex marriage laws “go a long way to turning down the temperature in the heated debate over” same-sex marriage).

²⁷⁷ Federal and state laws reflect this intuition. See *supra* note 14 (discussing the federal RFRA and look-a-like statutes in sixteen states). In 1997, in *City of Boerne v. Flores*, the Supreme Court found that the federal RFRA was unconstitutional as applied to the states, hastening the enactment of state RFRAs. See 521 U.S. 507, 536 (1993).

²⁷⁸ Laycock, *supra* note 169, at 198.

²⁷⁹ I am indebted to Professor Laycock for this observation.

²⁸⁰ See *infra* notes 289–357 and accompanying text.

felt “demean[ed],” as any of us would have.²⁸¹ The felt disapprobation resulted not from having to make an appointment to secure the needed license—all couples must now do this²⁸²—but from the clerk’s articulated reasons for the change: “I don’t think it’d do the couple any service to have me as their person, because it . . . grieve[s] the Holy Spirit that resides in my heart, and I don’t know if I’d be able to cover that up for them. So, I want to remove myself from this process.”²⁸³ If New York law allows the delegation of one task to a deputy and the clerk followed the correct procedure for making this delegation, no one need ever have known the animating reason behind the change.

In the commercial context of a large organization, sensitivity and forethought sometimes will allow religious objections to recede from public view. In businesses owned by sole proprietors or with few employees, however, a member of the public who is turned away will always know it. Some will find this cost too high.

Here, the case for a qualified exemption rests, in part, on two predictive judgments. First, as discussed earlier, public attitudes are likely to harden against same-sex marriage in the absence of accommodations.²⁸⁴ Second, it seems likely that the market itself will police religious objectors. As noted above, in August 2011, a New Jersey bridal salon owner refused to assist a woman with her gown because she was a lesbian; the owner reportedly said that the customer “came from a nice Jewish family, and it was a shame that [she] was gay.”²⁸⁵ Although the

²⁸¹ See Kingkade, *supra* note 223 (quoting Katie Carmichael as saying, “It’s demeaning, degrading and bottom line, it’s discrimination”).

²⁸² Some of the early reporting suggested that same-sex couples could not secure a license at all. See *id.* (indicating that “the publicly elected official responsible for issuing marriage licenses[] refused to issue one herself and told the couple to make an appointment with a deputy town clerk. There’s just one problem: There is no deputy town clerk”). Town officials later confirmed that the clerk “informed the town board on Aug. 8 that she would not issue same-sex marriage licenses because of her fundamental Christian beliefs. . . . [She] ‘agreed’ . . . to let her deputy clerk . . . issue all marriage licenses, including those to same-sex couples, in the future,” but “the bottom line for the town is that no one will be turned away and everyone will be treated the same.” See Scott Rapp, *Same-Sex Couple Threatens Legal Action Against Cayuga County Town Whose Clerk Refused to Issue Marriage License*, POST-STANDARD (Syracuse) (Sept. 14, 2011, 5:44 PM), http://www.syracuse.com/news/index.ssf/2011/09/same-sex_couple_threatens_lega.html (quoting Town Attorney Adam Van Buskirk).

²⁸³ See Karla Dial, *Friday Five: Rose Marie Belforti*, CITIZENLINK (Aug. 19, 2011), <http://www.citizenlink.com/2011/08/19/friday-five-rose-marie-belforti>.

²⁸⁴ See Rauch, *supra* note 90, at 24–27; Letter from Douglas Laycock to Me. Governor John Baldacci, *supra* note 48, at 260.

²⁸⁵ See Nina Terrero, *N.J. Bridal Shop Refused to Sell Wedding Dress to Lesbian Bride: Owner Says: “That’s Illegal”*, ABC NEWS (Aug. 19, 2011), <http://abcnews.go.com/US/nj-bridal-shop-refused-sell-wedding-dress-lesbian/story?id=14342333>.

owner denied the charges, the story went viral, and precipitated an onslaught of comments on the store's Facebook profile condemning the alleged discrimination.²⁸⁶

This example illustrates that objectors will often pay a cost in the market for objecting. Presumably, the salon owner lost all the business of gay couples in her community—in itself a sufficient penalty, likely to limit refusals to those who feel quite strongly about it.²⁸⁷ And it appears that the salon owner also lost business from friends of those gay couples and others who heard about her stance. The possibility of social sanctions is not confined only to commercial businesses, as the significant penalties faced by nurses who object to abortion in the workplace illustrate.²⁸⁸

In short, appropriately crafted exemptions should carefully balance marriage equality and religious liberty. Such exemptions should take into consideration whether an objection will create an actual roadblock to marriage and should therefore apply differently to actions taken by governmental officials and private businesspersons.

VI. SIXTH STICKING POINT: WE CANNOT DENY SAME-SEX SPOUSES AND WOMEN INSURANCE COVERAGE THEY NEED

The benefits issue raises especially thorny questions in the same-sex marriage and health care contexts. Unlike facilitation, where a hardship exemption can affirm both values at stake—access and religious liberty, with one prevailing sometimes and the other prevailing at other times—insurance coverage does not allow both interests to be affirmed simultaneously. Religious liberty will either prevail (with no benefits required) or it will not (with benefits required). Thus, it matters a great deal how policymakers choose to handle the benefits question.

The argument for a benefits exemption is not that exemptions will pose no hardship, but that failing to give an exemption often leads to greater hardships. Before the ACA, federal tax policy provided a significant “carrot” to employers to induce them to provide health care

²⁸⁶ See *Here Comes the Bride*, FACEBOOK, <http://www.facebook.com/pages/Here-Comes-the-Bride/202112169814595> (last visited Sept. 17, 2012); Review of *Here Comes the Bride*, YELP, <http://www.yelp.com/biz/here-comes-the-bride-somers-point> (last visited Sept. 17, 2012).

²⁸⁷ See *supra* notes 112–133 and accompanying text (discussing sincerity and the problem of lukewarm objectors).

²⁸⁸ See *supra* notes 31–32 and accompanying text (discussing *Danquah v. University of Medicine & Dentistry of New Jersey* and *Cenzon-DeCarlo v. Mount Sinai Hospital*).

coverage to employees, but it did not provide a “stick.”²⁸⁹ No federal law required employers to provide benefits to employees or their spouses—they simply could elect not to provide health care coverage.²⁹⁰ Although twenty-eight states mandate that any insurance sold in the state must offer contraceptive coverage,²⁹¹ all but eight “allow certain employers and insurers to refuse” to include such coverage.²⁹²

²⁸⁹ Employers are motivated to provide such benefits because they are tax-preferenced. See ALLIANCE FOR HEALTH REFORM, TAX TREATMENT OF HEALTH INSURANCE: A PRIMER 9–11 (2008), <http://www.allhealth.org/briefingmaterials/Transcript-1367.pdf>. Although employers “can deduct the cost of health insurance,” as they would for any business expense,

[t]he real subsidies for health insurance come[] from the fact that employees do not get taxed on the health benefits provide[d]. So, in other words, when an employer provides wages to an employee, those wages are taxed as income. When an employer provides health benefits to an employee, those benefits are not taxed as income. They’re essentially provided tax-free and, in effect, lower the taxes that an employee would otherwise pay.

Id. at 9–10; see also Gamage, *supra* note 25, at *9–10 (“The primary sources of this tax advantage were the tax exclusions for employer-provided health insurance,” permitting employees to “exclude the value of those subsidies from taxable income” and payroll taxes, and to take advantage of “cafeteria plan[s],” if offered by their employer, allowing them to use pre-tax dollars “to pay for health insurance premiums.”). For the specific tax treatment, see 26 U.S.C. § 106(a) (2006) (excluding employer contributions to fund health care benefits from employees’ income); *id.* § 105(b) (excluding from employees’ income benefits paid by employer-sponsored health care plans to the extent that benefits are paid to reimburse the cost of medical care for employees, their spouses, and dependents); *id.* § 162(a) (permitting employer deduction for ordinary business expenses); 26 C.F.R. § 1.162-10(a) (2012) (providing that amounts paid for health care benefit plans may be deducted under 26 U.S.C. § 162(a) if they are ordinary and necessary business expenses). After the ACA, small employers are incentivized to offer health care coverage to employees through tax credits. See Gamage, *supra* note 25, at *21 n.123.

Professor Amy Monahan calculates that, for two employees in the twenty-five percent tax bracket, both of whom “desire the same insurance coverage, [say, for example,] an individual policy that costs \$3,750,” the taxpayer who receives the policy through her employer “receives an effective subsidy of \$1,412 to purchase her health insurance coverage solely because her employer makes such coverage available to her, and regardless of whether her employer makes any contribution toward such coverage.” Amy Monahan, *The Complex Relationship Between Taxes and Health Insurance* 3–4 (Minn. Legal Stud. Research Paper No. 10-1 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1531322.

²⁹⁰ Dayna Bowen Matthew, *Controlling the Reverse Agency Costs of Employment-Based Health Insurance: Of Markets, Courts and a Regulatory Quagmire*, 31 WAKE FOREST L. REV. 1037, 1042 (1996) (“There is no statutory mandate requiring that employers must provide health insurance for their employees.”).

²⁹¹ See *Insurance Coverage for Contraception Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (Feb. 2012), <http://www.ncsl.org/issues-research/health/insurance-coverage-for-contraception-state-laws.aspx> (providing a state-by-state summary of mandated benefits); see also GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: INSURANCE COVERAGE OF CONTRACEPTIVES *2 (2012) [hereinafter GUTTMACHER REPORT], available at http://www.guttmacher.org/statecenter/spibs/spib_ICC.pdf (listing states that require insurers that

Far more crucially, however, such state mandates did not extend to private employer health plans unless the employer purchased insurance coverage from an insurer.²⁹³ This occurred because employee benefit plans of private employers enjoy substantial insulation from state law as a result of the broad preemptive shield erected by the Employee Retirement Income Security Act (ERISA).²⁹⁴ Thus, employers that provided health care coverage to their employees could easily es-

provide prescription drug coverage to include “the full range of FDA-approved contraceptive drugs and devices”).

²⁹² GUTTMACHER REPORT, *supra* note 291, at *2 (describing ‘a “limited” refusal clause” in three states “that allows only churches and church associations to refuse to provide coverage, and does not permit hospitals or other entities to do so;” a “broader” refusal clause” in seven states that “allows churches, associations of churches, religiously affiliated elementary and secondary schools, and, potentially, some religious charities and universities to refuse, but not hospitals;” an “expansive” refusal clause” in nine states allowing “religious organizations, including at least some hospitals, to refuse to provide coverage,” which extends in two states to “secular organizations with moral or religious objections;” a right to refuse in one state, Nevada, rather than an exemption; and an exemption in two states for insurers as well as employers); see Timothy Jost, *Newland v. Sebelius: The General Welfare, Religious Liberty, and Contraception Coverage Under the ACA*, HEALTHAFFAIRS BLOG (July 30, 2012), <http://healthaffairs.org/blog/2012/07/30/newland-v-sebelius-the-general-welfare-religious-liberty-and-contraception-coverage-under-the-aca> (“[T]wenty-one [states] have some form of religious exemption . . .”).

²⁹³ See EMP. BENEFIT RESEARCH INST., *ERISA AND HEALTH PLANS 4–6* (1995), available at <http://www.ebri.org/pdf/briefspdf/1195ib.pdf> (“States can indirectly regulate health care plans that provide benefits through insurance contracts by establishing the terms of the contract. . . . But they cannot do the same with respect to self-funded plans. That is one of the factors that has caused a great rise in the number of self-funded plans.”); see also *Metro Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (holding that a Massachusetts statute requiring mandatory minimum health care benefits in any general insurance policy, even if sold to an employee health care plan, was not preempted by ERISA because it applies to insurance contracts purchased by the plan).

²⁹⁴ ERISA broadly preempts state laws that “relate to” an employee benefit plan. See 29 U.S.C. § 1144(a) (2006). The “saving clause,” however, saves state laws that regulate insurance from preemption. See *id.* § 1144(b)(2)(A). The “deeme[r] clause” provides an exception to the saving clause exception. *Id.* § 1144(b)(2)(B). Under the deemer clause, self-funded plans are exempt from state laws that “regulat[e] insurance within the meaning of the saving clause.” *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990) (internal quotation marks omitted). Thus, ERISA preempts state laws regulating insurance with respect to self-funded plans, whereas insured plans are subject to indirect state insurance regulation. See *id.*

As a result of this broad preemption, a persistent criticism of ERISA has been that Congress, by failing to regulate meaningfully employee health benefit plans at the federal level, created a federal “regulatory vacuum.” WILLIAM J. CURRAN ET AL., *HEALTH CARE LAW AND ETHICS* 1076 (5th ed. 1998). One notable exception is mental health parity. See Stacey A. Tovino, *A Proposal for Comprehensive and Specific Essential Mental Health and Substance Use Disorder Benefits*, 38 AM. J.L. & MED. 471, 488–89 (2012) (noting that because the essential mental health and substance use disorder benefit that is part of the ACA’s “essential health benefits” provision, § 1302, doesn’t apply to all health plan settings, even after health care reform is fully implemented, full mental health parity will not be achieved because mental health and substance use disorder benefits will not be fully covered).

cape state-mandated benefits by simply “self-funding”—or paying for health care costs out of their own funds, sometimes backed up by a stop-loss insurance policy.²⁹⁵ ERISA’s significant insulation from state law “is one of the factors that has caused a great rise in the number of self-funded plans,” in which eighty-two percent of employees in large companies now find themselves.²⁹⁶

²⁹⁵ See EMP. BENEFIT RESEARCH INST. *supra* note 293, at 4–6. Employers that have self-funded “may not themselves be regulated as insurance companies even if the self-funded or self-insured plan purchases stop-loss insurance to cover losses or benefits payments beyond a specified level.” *Am. Med. Sec., Inc. v. Bartlett*, 111 F.3d 358, 361, 363 (4th Cir. 1997) (concluding that ERISA’s preemptive shield prevented Maryland from regulating self-funded private health benefit plans that used stop-loss coverage with a very low dollar threshold for payment by the insurer, because such regulations did not qualify as the regulation of the business of insurance and thus fell outside the saving clause). Although the Supreme Court has never addressed the question, lower courts have held that the purchase of stop-loss insurance does not cause self-funded plans to lose their status as self-funded. See Russell Korobkin, *The Battle over Self-Insured Health Plans, or ‘One Good Loophole Deserves Another,’* 5 YALE J. HEALTH POL’Y L. & ETHICS 89, 113–15 (2005).

²⁹⁶ See EMP. BENEFIT RESEARCH INST. *supra* note 293 at 4–6. According to a 2012 survey, 81% of covered workers in large firms (with two hundred or more workers) were in partially or completely self-funded plans, whereas only 15% of covered workers in small firms (with three to one hundred and ninety-nine workers) were in similar plans. KAISER FAMILY FOUND. & HEALTH RESEARCH EDUC. TRUST, EMPLOYER HEALTH BENEFITS: 2012 ANNUAL SURVEY 186 (2012), <http://ehbs.kff.org/pdf/2012/8345.pdf>; see also MICHAEL J. BRIEN & CONSTANTIJN W.A. PANIS, SELF-INSURED HEALTH BENEFIT PLANS 1 (2011), available at <http://www.dol.gov/ebsa/pdf/deloitte2011-1.pdf> (estimating that 42.7% of plans that filed a Form 5500 had a self-insured component); U.S. DEP’T LABOR, EMP. BENEFITS SECURITY ADMIN., GROUP HEALTH PLANS REPORT 1 (2012), <http://www.dol.gov/ebsa/pdf/ACA-ARC2012.pdf> (reporting that, as of 2009, for the “approximately 50,000 private sector employer-sponsored group health plans that filed a Form 5500” 42%, or 21,000 plans, “can be categorized as self-insured” or as mixed-insured).

Drawing on state-mandated benefit laws, some commentators urge that “[t]he battle against legal contraception has been fought and lost before, not only in the 1960s, but also in the 1990s, when state legislatures and courts repeatedly rejected the argument that religious liberty provides a justification for undermining women’s equality and denying them contraceptive insurance.” 158 CONG. REC. E1370 (daily ed. Aug. 1, 2012) (statement of Representative Laura Richardson). These commentators cite such cases as *Catholic Charities of Sacramento v. Superior Court*, in which the California Supreme Court upheld California’s Women’s Contraceptive Equity Act against claims that it violated the establishment and free exercises clauses of the California and United States Constitutions. See 85 P.3d 67, 95 (Cal. 2004). Unlike the employer in *Bartlett*, discussed above, the church-affiliated employer in *Catholic Charities of Sacramento* did not enjoy the benefit of ERISA preemption because it had not self-funded; this necessitated its ultimately failed attempt to secure an exemption on constitutional grounds. By emphasizing that “state legislatures . . . repeatedly rejected the argument that religious liberty provides a justification for . . . denying them contraceptive insurance,” these commentators overlook the fact that ERISA’s broad preemptive shield made it unnecessary for religious objectors to aggressively advocate for religious exemptions in the handful of states that provide no exemption to the state’s contraceptive mandate.

As with the health care context, employers may also choose not to provide other insurance benefits, such as life insurance benefits, for an employee's spouse.²⁹⁷ Thus, religious employers who believed they could not "recognize" same-sex spouses by providing insurance coverage could avoid the whole theological morass by refusing to provide benefit coverage to spouses of employees who are not already covered.²⁹⁸

This is precisely what happened several years ago after the District of Columbia recognized same-sex marriage. When the D.C. Council gave groups like Catholic Charities no other option—that is, no exemption—the religious organization took the nuclear option by eliminating coverage for the spouses of its 850 employees going forward rather than cover spouses in marriages that it could not recognize for religious reasons.²⁹⁹ When Catholic Charities chose this path, both sides lost out. Its employees could no longer add spouses to their health care cover-

²⁹⁷ *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefit plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan."). Employers are motivated to provide such benefits because they are tax-preferenced. See ALLIANCE FOR HEALTH REFORM, *supra* note 289, at 2, 9–10.

²⁹⁸ Some religious organizations may offer "employee plus one" coverage to side-step the collision between their religious doctrines and existing legal mandates when no exemption is forthcoming. The American Civil Liberties Union has urged that Catholic organizations do not need a benefits exemption because they could copy the Archdiocese of San Francisco, which took the "employee plus one" path. See Letter from Reverend John W. Wimberly, Jr. et al. to the Honorable Vincent C. Gray regarding D.C. Bill 18-482, the Religious Freedom and Civil Marriage Equality Amendment Act of 2009, at 1 (Nov. 20, 2009) (on file with author); see also Michelle Martin, *Area Catholic Hospitals Prepare for Ramifications of Civil Unions Bill*, CATHOLIC NEW WORLD (May 22, 2011), <http://www.catholicnewworld.com/cnwonline/2011/0522/2.aspx>. "Employee plus one" coverage may itself represent a rollback of existing insurance coverage. See BETH LEVIN CRIMMEL, AGENCY FOR HEALTHCARE RESEARCH & QUALITY, EMPLOYER-SPONSORED HEALTH INSURANCE FOR EMPLOYEES OF STATE AND LOCAL GOVERNMENTS, BY CENSUS DIVISION, (2010), available at http://meps.ahrq.gov/mepsweb/data_files/publications/st302/stat302.pdf. Whether all Catholic groups would accept this work-around is unclear. But, one can easily imagine that some religious employers would believe that this work-around is immoral.

²⁹⁹ See William Wan, *Same-Sex Marriage Leads Catholic Charities to Adjust Benefits*, WASH. POST, Mar. 2, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345.html>.

Starting Tuesday, Catholic Charities will not offer benefits to spouses of new employees or to spouses of current employees who are not already enrolled in the plan. . . . Staff members at the charity were not given advance notice of the new policy and will not be able to add a spouse now because the most recent open enrollment period ended in November. Those who use their health benefits to cover spouses will be grandfathered into the new policy.

age, paid primarily by the employer with tax-free dollars.³⁰⁰ As a result, the employees had to buy new coverage for their spouses on the individual market, at higher prices and with after-tax dollars.³⁰¹ Catholic Charities lost out as an employer, too. When an employer sheds or reduces benefits, it becomes harder for it to compete in the marketplace for employees.³⁰²

The ACA did not substantially alter the calculus for private employers. The nuclear option remains available to some religious objectors at no cost, as explained below. To others, it comes at a price, measured by the number of employees, although the cost of the penalties will almost certainly be much less than the cost of providing subsidized insurance to employees, as the objecting institution may have in the past.³⁰³

Under the ACA, employers providing health care coverage must comply with the interim final rules on the scope of coverage for preventative services.³⁰⁴ No plan can be sold—and no employer can self-insure—unless it complies with coverage requirements.³⁰⁵ The Obama administration's "accommodation" requires insurers, and not employers directly, to provide those services free of charge.³⁰⁶ This arrangement simply does not work for self-insured employers because there are no insurers available to provide the mandated benefits for free, unless the government forces a plan's third-party administrator to do this.³⁰⁷ Further, since more than one-third of employers act as their own ad-

³⁰⁰ See ALLIANCE FOR HEALTH REFORM, *supra* note 289, at 9–10.

³⁰¹ See Uwe E. Reinhardt, *Is Employer-Based Health Insurance Worth Saving?*, N.Y. TIMES (May 22, 2009, 6:05 AM), <http://economix.blogs.nytimes.com/2009/05/22/is-employer-based-health-insurance-worth-saving>.

³⁰² See *infra* notes 318–319 and accompanying text (discussing the need for employers to offer a greater salary when they fail to provide benefits in order to compete in the marketplace for employees).

³⁰³ See *infra* notes 313–317 and accompanying text.

³⁰⁴ 45 C.F.R. § 156.275 (2012) (mandating that qualified health plans comply with clinical quality measures in various areas, including preventive care). See generally Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventative Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621 (Aug. 3, 2011) (specifying the scope of required coverage for preventative care).

³⁰⁵ See 76 Fed. Reg. at 46,622–23.

³⁰⁶ See *supra* notes 22–27 and accompanying text.

³⁰⁷ See *supra* notes 22–27 and accompanying text. A third-party administrator is an “entity required to make or responsible for making payment on behalf of a group health plan . . . [or a b]usiness associate that performs claims administration and related business functions for a self-insured entity.” See CTR. FOR MEDICARE & MEDICAID SERVS., GLOSSARY, <http://www.cms.gov/apps/glossary/default.asp?Letter=T&Language=English> (last visited Sept. 17, 2012). Third-party administrators, however, assume no liability for claims made in the insurance pool. See *id.*

ministrators, there is not even a third-party administrator to provide the coverage.³⁰⁸

Putting aside whether this arrangement will even work, religious objectors, whether institutional or individual, remain stuck receiving coverage that violates their religious convictions. This leaves only one way out: the nuclear option. Under the ACA, some employers can in fact take this way out, although at significant—but perhaps not devastating—cost.

Consider an employer who falls outside the ACA's penalty threshold—that is, an employer with fewer than fifty employees or an employer with fifty or more employees, not one of whom receives a “premium credit” or government subsidy for his or her cost-sharing for coverage.³⁰⁹ If that employer objects to the new coverage mandate for religious reasons, it can simply trigger the nuclear option and abandon all health care coverage for its employees. Zaytuna College, which self-identifies as a “Muslim institution of higher learning,” provides one example.³¹⁰ Zaytuna College reported twenty-five employees on its 2009 Internal Revenue Service Form 990,³¹¹ meaning that it can simply drop all coverage and pay no penalty.³¹²

³⁰⁸ Press Release, HighRoads, HighRoads Study Shows Employers Anticipate Rising Costs in Outsourced Health Benefits Administration (Nov. 26, 2010), *available at* <http://www.businesswire.com/news/home/20101116005643/en/HighRoads-Study-Shows-Employers-Anticipate-Rising-Costs> (noting that an employer's incentive to self-administer its health plan may change because of the ACA).

³⁰⁹ The ACA's premium credit subsidizes an employee's cost sharing when the employee's household income is less than 400% of the federal poverty level and the employee is required to pay more than 9.5% of his or her household income for health care coverage. *See* ACA, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 1513(a), 124 Stat. 1029; I.R.C. § 36B(b) (3) (A) (i) (Supp. I 2011); HINDA CHAIKIND & CHRIS L. PETERSON, CONG. RESEARCH SERV., SUMMARY OF POTENTIAL EMPLOYER PENALTIES UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT 6 (2010), *available at* <http://www.shrm.org/hrdisciplines/benefits/Documents/EmployerPenalties.pdf>.

³¹⁰ *See Our History*, ZAYTUNA C., http://www.zaytunacollege.org/about/our_history (last visited Sept. 17, 2012). Zaytuna's cofounder joined the leaders of other universities in opposing the coverage mandate. *See* Garvey et al., *supra* note 24 (listing signatories).

³¹¹ *See* Zaytuna College, IRS Form 990, Return of Organization Exempt from Income Tax, pt. I, l. 5 (2009), *available at* http://dynamodata.fdncenter.org/990_pdf_archive/330/330720978/330720978_201007_990.pdf (indicating that Zaytuna College had twenty-five employees for the taxable year beginning August 1, 2009 and concluding July 31, 2010).

³¹² Religiously affiliated colleges and universities may employ the nuclear option in other ways, too. The Franciscan University of Steubenville, Ohio recently announced that it would terminate its student health insurance plan rather than obey the new requirement that the plan cover birth control. *See Franciscan University Drops Student Health Insurance Plan over Birth Control Mandate, Costs*, MSNBC.COM (May 15, 2012, 5:05 PM), <http://usnews>.

For employers that do meet the penalty threshold (those with fifty or more employees, at least one of whom receives a “premium credit”), there would be substantial penalties for failing to provide coverage.³¹³ The annual fine for an employer with fifty employees would be \$40,000. This penalty, although considerable, would be offset by savings the objecting institution realizes by eliminating coverage, as a consequence of which their employees will fall on the insurance exchanges.

A substantial literature has developed showing that private employers will frequently come out ahead financially by eliminating the subsidized health care coverage they previously provided to their employees.³¹⁴ With the health care costs for American families now ex-

msnbc.msn.com/_news/2012/05/15/11720706-franciscan-university-drops-student-health-insurance-plan-over-birth-control-mandate-costs.

³¹³ The formula for determining the annual penalty is: (total number of employees – 30) x (\$2000). See ACA § 1513(a); I.R.C. § 4980H(a); NAT’L FED’N OF INDEP. BUS. RESEARCH FOUND., ACA: EMPLOYER MANDATE PENALTIES, CRIBSHEET 11-1 (2011), available at <http://www.nfib.com/Portals/0/PDF/AllUsers/research/cribsheets/employer-mandate-penalties-nfib-cribsheet.pdf>. If an employer offers a health plan that simply does not include the mandated coverage, a different penalty is assessed, up to \$100 per day per employee. See, e.g., CYNTHIA BROUGH, CONG. RESEARCH SERV., R42370, PREVENTIVE HEALTH SERVICES REGULATIONS: RELIGIOUS INSTITUTIONS’ OBJECTIONS TO CONTRACEPTIVE COVERAGE 14, 16 (2012) (describing an excise tax under the Internal Revenue Service Code for noncompliant employment-based group health plans, as well as possible penalties under the Public Health Service Act for self-insured governmental plans, health insurance issuers providing group health coverage, and coverage in the individual market, and under ERISA for insured and self-insured group health plans and insurance issuers providing group health coverage). The fine for noncompliant plans and the annual penalty for failing to provide health care coverage appear to be alternative penalties. See, e.g., Jennifer Marshall & Dominique Ludvigson, *Judge Issues Preliminary Injunction on Behalf of Business Owner in HHS Mandate Fight*, FOUNDRY (July 29, 2012, 8:17 PM), <http://blog.heritage.org/2012/07/29/judge-issues-preliminary-injunction-on-behalf-of-business-owner-in-hhs-mandate-fight/> (describing the “alternative[s]” facing religious objectors and calculating penalties under each scenario).

Employers that offer coverage that is deemed “unaffordable” also face penalties. This penalty equals one-twelfth of \$3000 multiplied by the number of full-time employees that receive the exchange subsidies because the insurance offered to them by their employer was “unaffordable,” capped by “the amount that the employer would have been liable for had the [I.R.C. §] 4980H(a) penalty been triggered instead.” Gamage, *supra* note 25, at *22 (citing I.R.C. § 4980H(b)(1)).

³¹⁴ See Epstein & Hyman, *supra* note 25, at 4 (noting that some employers will be financially better off by paying the penalty and “dumping” their employees on the exchanges, rather than paying the employer’s portion of coverage costs); see also Kathryn L. Moore, *The Future of Employment-Based Health Insurance After the Patient Protection and Affordable Care Act*, 89 U. NEB. L. REV. 885, 906–12 (2011) (analyzing empirical data from Massachusetts and San Francisco to predict whether certain employers will choose to pay the ACA’s penalty rather than provide health care coverage); *supra* note 25 (citing scholarly opinion that the ACA creates perverse incentives that will lead some employers to drop certain employees on the insurance exchanges).

ceeding, by one estimate, \$20,000 annually³¹⁵—and with average employers picking up 82% of the coverage costs of single individuals and 72% for families, on average³¹⁶—it is easy to see why employers may be eager to drop subsidized coverage, even in the absence of a religious exemption. Not all employees will be disadvantaged by such a move, especially employees who are low- and moderate-income earners. These employees qualify for substantial premium tax credits if their employer fails to provide health care coverage entirely or offers “unaffordable” coverage.³¹⁷

It is true that employers that provide fewer benefits generally have to pay greater salaries to compete for employees, all other things being equal.³¹⁸ Indeed, “[e]conomists generally agree employee benefits are a dollar-for-dollar substitute for wages.”³¹⁹ Nevertheless, an objecting institution that drops coverage would not have to increase pay for lower-income employees to compensate for the missing benefit because such employees will be made better-off financially by receiving premium tax credits. For higher-income employees, the institution likely would have to adjust pay.³²⁰ Ultimately, the cost of the nuclear option

³¹⁵ See MILLIMAN, 2012 MILLIMAN MEDICAL INDEX 1 (2012), available at <http://publications.milliman.com/periodicals/mmi/pdfs/milliman-medical-index-2012.pdf>. A 2011 study by the Kaiser Family Foundation estimated that the total average annual cost of health care coverage for a family was \$15,078. See Julie Appleby, *Costs of Employer Insurance Plans Surge in 2011*, KAISER HEALTH NEWS (Sept. 27, 2011), <http://www.kaiserhealthnews.org/stories/2011/september/27/employer-health-coverage-survey-shows-employer-spend-ing-spike.aspx>.

³¹⁶ *Employer Health Benefits: 2011 Summary of Findings*, KAISER FAMILY FOUND. & HEALTH RESEARCH EDUC. TRUST (Sept. 27, 2011), <http://ehbs.kff.org/>.

³¹⁷ See Gamage, *supra* note 25, at *17, *23 (estimating that, for a worker in a family of four whose household income is 100% of the federal poverty level (\$24,000 a year), the value of premium tax credits received, together with the value of cost-sharing subsidies received, equals \$18,433, more than dwarfing the tax value of any employer-provided health care coverage, and, in one break-even analysis, calculating the net-benefit to the employee at \$16,309). Coverage is considered “affordable” when the employee’s contribution for employee-only coverage is less than 9.5% of the employee’s household income. I.R.C. § 36B(c)(2)(C)(i) (II) (Supp. I 2011).

³¹⁸ See THOMAS J. ATCHISON ET AL., INTERNET BASED BENEFITS & COMPENSATION ADMINISTRATION (2012), available at <http://www.eridlc.com/index.cfm?fuseaction=textbook.chpt20>.

³¹⁹ Devon Herrick, *Health Exchange Subsidies Will Reduce Employer Health Plans*, NAT’L CENTER FOR POL’Y ANALYSIS (Nov. 16, 2011), <http://www.ncpa.org/pub/ba758>.

³²⁰ Predicting the true cost of the nuclear option to an employer would require knowing how many full-time or part-time employees it has, the cost of existing coverage, the amount of the employer’s subsidy for that coverage, what the mix of low- and moderate-income employees is to higher-income employees, and the household income of lower-income employees (in order to determine the value of premium tax credits to them), among other factors.

may not be nearly as great as the calculated penalty suggests and certainly may not be prohibitive for smaller religious employers.³²¹

As the number of employees increases, however, so does the annual penalty. It does not take long for the financial penalty to become massive. For example, the Catholic cable television broadcaster that filed suit challenging the coverage mandate would pay more than \$700,000 annually.³²² Colorado Christian University, which self-identifies as a nondenominational, evangelical university and employs 922 people, would face an annual penalty of \$1,784,000 if it dropped coverage for its employees rather than violate its religious beliefs; this threat prompted the school to sue the Obama administration as well.³²³ But here again, the true cost of the nuclear option needs to be adjusted to account for the religious objector's savings in eliminating coverage for all its em-

³²¹ Epstein & Hyman, *supra* note 25, at 4.

³²² Eternal Word Television Network (ETWN) reported 384 employees on its 2010 Form 990, filed with the Internal Revenue Service. See Eternal Word Television Network, IRS Form 990, Return of Organization Exempt from Income Tax, pt. I, l. 5 (2010), available at http://dynamodata.fdncenter.org/990_pdf_archive/630/630801391/630801391_201012_990.pdf. This yields a penalty of \$708,000 [(384 - 30) x \$2000]. See also Tyler Kingkade, *Catholic Colleges File Lawsuit Against Feds over Birth Control Rule*, HUFFINGTON POST (Feb. 22, 2012, 3:00 PM), http://www.huffingtonpost.com/2012/02/22/catholic-colleges-file-lawsuit-feds_n_1293814.html (reporting that EWTN filed suit to challenge the ACA).

³²³ See *What We Believe*, COLO. CHRISTIAN UNIV., <http://www.ccu.edu/welcome/we-believe.asp> (last visited Sept. 17, 2012); see also Colo. Christian Univ., IRS Form 990, Return of Organization Exempt from Income Tax, pt. I, l. 5 (2009), available at http://dynamodata.fdncenter.org/990_pdf_archive/840/840442429/840442429_201006_990.pdf (indicating 922 employees for the tax year beginning July 1, 2009 and concluding June 30, 2010). This yields a penalty of \$1,784,000 [(922 - 30) x \$2000]. See Kingkade, *supra* note 322 (reporting that Colorado Christian University has been joined in its legal challenge to the ACA by Ave Maria University, Belmont Abbey College, and Geneva College, all of which argue that even with the Obama administration's accommodation for religious employers, the coverage mandate nonetheless conflicts with their belief that birth control is immoral). Ave Maria University reported 631 employees on its 2009 Form 990, which means it would pay a penalty of \$1,202,000. See Ave Maria Univ., IRS Form 990, Return of Organization Exempt from Income Tax, pt. I, l. 5 (2009), available at http://dynamodata.fdncenter.org/990_pdf_archive/030/030482006/030482006_201006_990.pdf. Belmont Abbey College would incur penalties of approximately \$1,050,000 if it were to drop coverage for its 555 employees. See Belmont Abbey Coll., IRS Form 990, Return of Organization Exempt from Income Tax, pt. I, l. 5 (2009), available at http://dynamodata.fdncenter.org/990_pdf_archive/560/560547498/560547498_201005_990.pdf; FAQs: *Becket Fund's Lawsuits Against HHS*, BECKET FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/faq> (last visited Sept. 17, 2012). Geneva College reported 1439 employees on its 2009 Form 990, which would yield a penalty of \$2,818,000 [(1439 - 30) x \$2000]. See Geneva Coll., IRS Form 990, Return of Organization Exempt from Income Tax, pt. I, l. 5 (2009), available at http://dynamodata.fdncenter.org/990_pdf_archive/250/250965376/250965376_201005_990.pdf.

employees, offset by the additional wages that it must offer to remain competitive in the marketplace.³²⁴

For much larger employers, the annual costs of the nuclear option would seem at first blush to be almost unsustainable. For Catholic Charities of the Archdiocese of Washington, which employs over 1000 people, penalties would crest \$2 million annually;³²⁵ the University of Notre Dame,³²⁶ with its 16,445 employees, would face an annual penalty of \$32,830,000.³²⁷ As before, however, these gargantuan penalties

³²⁴ *Supra* notes 318–321 and accompanying text.

³²⁵ See Catholic Charities of the Archdiocese of Wash., IRS Form 990, Return of Organization Exempt from Income Tax, pt. I, l. 5 (2009), *available at* http://dynamodata.fdncenter.org/990_pdf_archive/530/530196524/530196524_201006_990.pdf (indicating 1118 employees for the tax year beginning July 1, 2009 and concluding June 30, 2010). This yields a penalty of \$2,176,000 [(1118 – 30) x \$2000].

³²⁶ On May 21, 2012, the University of Notre Dame brought suit against the federal government over the coverage mandate. See Complaint at 1–4, *Univ. of Notre Dame v. Sebelius*, No. 3:2012-cv-00253 (N.D. Ind. May 21, 2012), *available at* http://opac.nd.edu/assets/69013/hhs_complaint.pdf. As Notre Dame president Father John Jenkins, C.S.C., explained:

Let me say very clearly what this lawsuit is *not* about: it is not about preventing women from having access to contraception, nor even about preventing the Government from providing such services. Many of our faculty, staff and students—both Catholic and non-Catholic—have made conscientious decisions to use contraceptives. As we assert the right to follow our conscience, we respect their right to follow theirs. And we believe that, if the Government wishes to provide such services, means are available that do not compel religious organizations to serve as its agents. We do not seek to impose our religious beliefs on others; we simply ask that the Government not impose its values on the University when those values conflict with our religious teachings. . . .

This filing *is* about the freedom of a religious organization to live its mission, and its significance goes well beyond any debate about contraceptives. For if we concede that the Government can decide which religious organizations are sufficiently religious to be awarded the freedom to follow the principles that define their mission, then we have begun to walk down a path that ultimately leads to the undermining of those institutions. For if one Presidential Administration can override our religious purpose and use religious organizations to advance policies that undercut our values, then surely another Administration will do the same for another very different set of policies, each time invoking some concept of popular will or the public good, with the result these religious organizations become mere tools for the exercise of government power, morally subservient to the state, and not free from its infringements. If that happens, it will be the end of genuinely religious organizations in all but name.

Press Release, Office of the President, Univ. of Notre Dame, A Message from Father Jenkins on the HHS Lawsuit (May 21, 2012), *available at* <http://president.nd.edu/communications/a-message-from-father-jenkins-on-the-hhs-lawsuit> (emphasis added).

³²⁷ The University of Notre Dame reported 16,445 employees on its last Form 990, filed with the Internal Revenue Service. See Univ. of Notre Dame, IRS Form 990, Return of

would be offset by the savings to the religious objector in no longer subsidizing health care coverage for its employees, although the objectors would need to provide some additional wages to higher-income employees to remain competitive as an employer.³²⁸

It would not be surprising if some employees of religious groups shared the group's religious objections to the mandated coverage, nor would it be surprising for ordinary individuals employed elsewhere to have religious objections.³²⁹ Yet, the impact on individuals has been largely lost in the debate over mandated coverage. Under the ACA's individual mandate, an individual must show coverage through an employer or public insurance, or privately purchase coverage,³³⁰ unless exempt from the duty to do so as the result of low income or the lack of an affordable plan in the market.³³¹ Failing to do so prompts a monetary penalty like those paid by employers, which varies with the individual's income.³³²

Organization Exempt from Income Tax, pt. I, l. 5 (2009), *available at* http://dynamodata.fdncenter.org/990_pdf_archive/350/350868188/350868188_201006_990.pdf. This yields a penalty of \$32,830,000 [(16,445 – 30) x (\$2000)]. Other universities have also objected to the coverage mandate. For example, Liberty University, which reported 5457 employees on its 2009 Form 990, would pay a penalty of \$10,854,000. *See* Liberty Univ., IRS Form 990, Return of Organization Exempt from Income Tax, pt. I, l. 5 (2009), *available at* [http://dynamodata.fdncenter.org/990_pdf_archive/540/540946734/540946734_201006_990 .pdf](http://dynamodata.fdncenter.org/990_pdf_archive/540/540946734/540946734_201006_990.pdf); *Reaction to Obama's Birth Control Compromise*, GUARDIAN (London) (Feb. 10, 2012), <http://www.guardian.co.uk/world/feedarticle/10087882> (reporting the views of Liberty University's vice president and dean of the law school).

³²⁸ *See supra* notes 318–321 and accompanying text.

³²⁹ Some may ask how the coverage mandate is different from a general duty to pay taxes, which fund wars and other services to which an individual might object on secular or sectarian grounds. The coverage mandate has a disproportionate and direct impact on individuals who believe that by participating in an insurance pool, they are facilitating the use by others of drugs that cut off potential life, both before fertilization and after. Many faith groups are not opposed to taxes because government decisions are intervening acts and the result of those acts are too removed from the believer for the believer to have any moral culpability. Here, the objector, charged with responsibility for his or her own moral act of facilitating the end of a potential life, must decide whether to comply with the law or violate a religious tenet.

³³⁰ ACA, Pub. L. No. 111-148, § 1501(f), 124 Stat. 119 (2010).

³³¹ The individual mandate applies only if an individual is able to secure health care coverage that costs less than eight percent of the individual's household income, after applying premium tax credits or employer contributions, if any. 26 U.S.C. § 5000A(c)(1) (Supp. IV 2011). Moreover, "workers with household incomes below 133 percent of the federal poverty line will generally qualify for Medicaid." Gamage, *supra* note 25, at *2, n.8.

³³² If an employer exercises the nuclear option, some lower-income employees may come out ahead because they will receive subsidies to purchase coverage from an insurance exchange. *See supra* notes 314–317 and accompanying text (estimating that low- and moderate-income workers may benefit financially by securing health care coverage through ex-

So what recourse does the individual who objects to mandated coverage have? First, although the ACA contains an individual religious exemption, it is extremely narrow.³³³ ACA's exemption parrots the religious exemption in the Social Security Act for the Amish, who are exempted from paying social security taxes.³³⁴ Although the Amish and substantially similar religious groups³³⁵ will qualify for ACA's religious exemptions, most individual objectors will fall outside the exemption's narrow bounds.³³⁶ A second option for the individual objector is to join a health care sharing ministry, shielding the individual from a tax penalty.³³⁷ These sharing ministries, however, offer very limited benefits. Few ministries exist, and because any qualifying sharing ministries must have been in existence on December 31, 1999, the market cannot grow.³³⁸ Further, even though members of sharing ministries pool their resources, participation in a ministry does not provide the security of a real insurance product: ministries do not guarantee payment or retain financial reserves.³³⁹ Regulators presumably could increase the protec-

changes). An employee who objects to mandated coverage on religious grounds, however, wants no coverage if it includes the objectionable service, not cheaper coverage.

³³³ See 26 U.S.C. § 5000A(d)(2)(A).

³³⁴ Samuel T. Grover, Note, *Religious Exemptions to the PPACA's Health Insurance Mandate*, 37 AM. J.L. & MED 624, 629 (2011).

³³⁵ See Jost, *supra* note 2, at 42 n.119 (identifying the religious groups likely to qualify).

³³⁶ To qualify for the individual religious exemption, an individual must meet five criteria. The first three establish basic elements: (1) he or she must belong to a religious sect and subscribe to its tenets; (2) the individual must waive Social Security benefits; and (3) the sect must establish these tenets. The remaining requirements are much more limiting: (4) the sect must have a substantial history of providing for and taking care of its dependent members; and (5) the sect has been in existence since December 31, 1950. 26 U.S.C. § 5000A(d)(2)(A) (exempting from the individual mandate any "member of a recognized religious sect or division thereof which is described in section 1402(g)(1), and . . . an adherent of established tenets or teachings of such sect or division as described in such section"); see *id.* § 1402 (g).

³³⁷ 26 U.S.C. § 5000a(d)(2)(B)(2) (Supp. IV 2011) (exempting from the individual mandate members of health care sharing ministries).

³³⁸ See *id.*; Jost, *supra* note 2, at 43 (estimating that 100,000 people are members of such health care sharing ministries, which are generally restricted to Christians who abstain from alcohol, drugs, smoking, or extramarital sex); Michelle Andrews, *Some Church Groups Form Sharing Ministries to Cover Members' Medical Costs*, KAISER HEALTH NEWS (Apr. 25, 2011), <http://www.kaiserhealthnews.org/Features/Insuring-Your-Health/Michelle-Andrews-on-Health-Care-Religious-Cooperatives.aspx> (estimating that "the total number of people who are sharing their medical costs [is] roughly 120,000").

³³⁹ Andrews, *supra* note 338 ("If there's a shortfall one month . . . every household seeking help gets a prorated portion of its needs covered, and the ministry asks members for voluntary contributions to make up the difference. If the shortfall continues, members vote on raising the share amount."). Fact sheets for the ministries explain that they do not operate as an insurance product. See, e.g., ALLIANCE HEALTH CARE SHARING MINISTRIES, <http://www.healthcaresharing.org/hcsm/> (last visited Sept. 17, 2012) ("HCsMs [health

tion that sharing ministries provide to members, but it remains to be seen whether this will occur.³⁴⁰

The ACA's individual mandate does contain a hardship exemption, but it provides very little detail about what would qualify for such an exemption.³⁴¹ No regulations have been issued as to the scope and availability of any hardship waiver. Thus, it remains to be seen whether religious objectors can avail themselves of this way out.

The individual employee-objector's third option is to drop his or her health care coverage and "go naked." The costs for "going naked" include not just the monetary penalties, which may be stiff, but also the financial risks associated with having no health care coverage at all.³⁴²

The individual mandate applies if an individual or family's income exceeds the federal threshold for taxation.³⁴³ For 2011, the threshold

care sharing ministries] are not insurance companies. HCSMs do not assume any risk or guarantee the payment of any medical bill. Eighteen states as of May, 2012 have explicitly recognized this and specifically exempt HCSMs from their insurance codes."). "By contrast, insurance companies face considerable regulation as to solvency, reserves, and other matters [like actuarial estimates] precisely because the companies agree by contract to guarantee payment for covered services." See Andrews, *supra* note 336. Although these ministries may provide important assistance with payment of smaller claims, in the case of catastrophic claims, participation in a sharing ministry may not be materially better than "going naked."

³⁴⁰ The Obama administration has not yet released regulations fleshing out the scope of the individual religious exemption. One prominent supporter of ACA, Professor Timothy Jost, has noted that "these questions are unavoidable in a society that attempts to on the one hand adopt generally applicable laws addressing controversial subjects, and on the other hand maintain a high regard for religious liberty." Jost, *supra* note 292. He suggests that a promising way forward for "reconciling" the "religious freedom of employers with the right of employees to access vital health services" would be to mimic federal legislation "excusing employer contributions to Social Security where both the employer and employee had religious objections, but not otherwise." *Id.*

³⁴¹ See ACA, Pub. L. No. 111-148, § 1411, 124 Stat. 119 (2010).

³⁴² See *No Insurance Creates Serious Health Risks*, ACP INTERNIST, available at <http://www.acpinternist.org/archives/2000/01/atpress.htm> (last visited Sept. 17, 2012) (noting studies that indicate that "the uninsured may be three times more likely than the insured to experience adverse [health] outcomes . . . partly because uninsured individuals are less likely to have a regular source of care or to have visited a physician recently . . . [and] are also less likely to use preventive services").

³⁴³ Any individual or family that does not meet the taxation threshold will be exempt from the individual mandate. See KAISER FAMILY FOUND., FOCUS ON HEALTH REFORM: SUMMARY OF NEW HEALTH REFORM LAW 1 (2011), available at <http://www.kff.org/healthreform/upload/8061.pdf>. There are seven other groups exempted from the individual mandate: incarcerated individuals, undocumented immigrants, individuals for whom the required contribution exceeds eight percent of an individual's income, individuals with a coverage gap less than three months in duration, individuals with a hardship exemption, Native Americans, and individuals with a religious exemption. See *id.* The individual religious exemption is very narrowly tailored and is generally used only by the Amish and some Mennonites. See 26 U.S.C. § 1402(g)(1) (2006 & Supp. II 2009); Maura

was \$9500 for individuals and \$19,000 for families.³⁴⁴ If an individual or family refuses to comply with the individual mandate, the monetary penalty, starting in 2016,³⁴⁵ will be the greater amount of either: (1) a flat fee ranging from \$695 per year³⁴⁶ up to three times that amount (maximum \$2085),³⁴⁷ or (2) two and a half percent of income.³⁴⁸ Four examples clarify how the penalty would play out in different circumstances:³⁴⁹

- 1) A family of four earning the median U.S. household income of \$49,445³⁵⁰ would pay a fee of \$2025 for “going naked,” because their flat fee amount is greater than the percentage fee.³⁵¹

Reynolds, *Health Bills Allow Some a Religious Exemption*, CONG. Q. POL. & MSNBC.COM (Aug. 3, 2009, 9:46 AM), available at <http://www.msnbc.msn.com/id/32267628/>.

³⁴⁴ See I.R.S. Publ’n 501, at 3 (Dec. 2, 2011), available at <http://www.irs.gov/pub/irs-pdf/p501.pdf>.

³⁴⁵ The penalties begin to take effect in 2014, but do not reach their full amounts until 2016. See KAISER FAMILY FOUND., *supra* note 343, at 1.

³⁴⁶ The \$695 will be adjusted for inflation yearly after 2016. See BLUE CROSS BLUE SHIELD OF R.I., FEDERAL HEALTHCARE REFORM: PATIENT PROTECTION AND AFFORDABLE CARE ACT INDIVIDUAL MANDATE & SUBSIDY 2 (2010), available at https://www.bcbsri.com/BCBSRIWeb/pdf/Individual_Mandate_Fact_Sheet.pdf.

³⁴⁷ The \$695 is calculated for each spouse, plus \$695 for each dependent over the age of eighteen, with dependents under the age of eighteen resulting in a fractional amount of \$695. See *id.* The limit on the flat fee is \$2085 per family, no matter the number of dependents. See *id.* Thus, for example, a family of five with three children over the age of eighteen still will pay only the \$2085 flat fee. See *id.*

³⁴⁸ The 2.5% of income is calculated by subtracting the tax filing threshold amount (for example, \$19,000 for families in 2011) from the total amount of income reported. See *id.* A family earning \$100,000 a year in 2011 would subtract \$19,000, for a total of \$81,000. The 2.5% would then be calculated against the \$81,000, equaling \$2025, the amount the family would have to pay as the penalty under the percentage. In other words: (Gross Income - Tax Threshold Amount) x 0.025 = amount of percentage penalty; (100,000 - \$19,000) x 0.025 = \$2025.

³⁴⁹ All of the following examples are made using the 2011 tax threshold and the 2016 penalty schedule. See *supra* notes 343–348 and accompanying text.

³⁵⁰ See Press Release, U.S. Census Bureau, Income, Poverty and Health Insurance Coverage in the United States: 2010 (Sept. 13, 2011), available at http://www.census.gov/newsroom/releases/archives/income_wealth/cb11-157.html.

³⁵¹ This family’s penalty will be the greater of their percentage penalty or flat fee. The percentage penalty is calculated by subtracting the tax filing threshold amount from the total amount of income reported, multiplied by 2.5%: (gross income - tax threshold amount) x 0.025 = amount of percentage penalty; in this case (\$49,455 - \$19,000) x 0.025 = \$761.38. The flat fee has a maximum of \$2025, which will apply to a family of four. Because \$2025 is greater than \$761.38, this family will pay \$2025—the flat fee amount.

- 2) A family of four earning \$150,000 would pay \$3275 for “going naked,” because their percentage fee is greater than the flat fee.³⁵²
- 3) An individual earning \$50,000 would be subject to a penalty of approximately \$1010, because the percentage fee is greater than the flat fee.³⁵³
- 4) An individual earning \$26,364, the 2011 median annual wage,³⁵⁴ would be subject to a penalty of \$695, because the flat fee is greater than the percentage fee.³⁵⁵

Of course, objectors who drop coverage and pay the fine will not be able to purchase an unobjectionable insurance product in the market once the ACA’s extensive regulation of the insurance exchanges begins.³⁵⁶

Whether they be individuals or groups, religious objectors to the coverage mandate can solve the collision between their religious convictions and the demands of the law only by taking extreme measures, sometimes at great personal costs to themselves. A benefits exemption would give religious objectors a less extreme way out, which permits them to comply both with the law and with their religious tenets. Thus,

³⁵² This family’s penalty will be the greater of their percentage penalty or flat fee. The percentage penalty is calculated by subtracting the tax filing threshold amount from the total amount of income reported, multiplied by 2.5%: (gross income - tax threshold amount) \times 0.025 = amount of percentage penalty; in this case $(\$150,000 - \$19,000) \times 0.025 = \$3275$. The flat fee has a maximum of \$2025 which will apply to a family of four. Because \$3275 is greater than \$2025, this family will pay \$3275, the percentage fee amount.

³⁵³ This individual’s penalty will be the greater of the percentage penalty or flat fee. The percentage penalty is calculated by subtracting the tax filing threshold amount from the total amount of income reported, multiplied by 2.5%: (gross income - tax threshold amount) \times 0.025 = amount of percentage penalty; in this case $(\$50,000 - \$9500) \times 0.025 = \$1012.50$. As noted earlier, the individual’s tax threshold is lower than that for a family. The flat fee has a maximum of \$2025, which will not be used here since we are concerned with an individual. Instead, the flat fee amount is \$695. Because \$1012.50 is greater than \$695, the individual will pay \$1012.50, the percentage fee amount.

³⁵⁴ See Jillian Berman, *U.S. Median Annual Wage Falls to \$26,364 as Pessimism Reaches 10-Year High [Correction]*, HUFFINGTON POST (Jan. 23, 2012, 8:48 AM), http://www.huffingtonpost.com/2011/10/20/us-incomes-falling-as-optimism-reaches-10-year-low_n_1022118.html.

³⁵⁵ This individual’s penalty will be the greater of the percentage penalty or flat fee. The percentage penalty is calculated by subtracting the tax filing threshold amount from the total amount of income reported, multiplied by 2.5%: (gross income - tax threshold amount) \times 0.025 = amount of percentage penalty; in this case $(\$26,364 - \$9500) \times 0.025 = \$421.60$. As above, the individual’s tax threshold is lower than that for a family. The flat fee has a maximum of \$2025, which will not be used here since we are concerned with an individual. Instead, the flat fee amount is \$695. Because \$695 is greater than \$421.60, the individual will pay \$695, the flat fee amount.

³⁵⁶ See *supra* notes 343–348 and accompanying text.

the question for policymakers becomes not *whether* to avoid harm, but rather *which* harm to avoid as they seek to balance two competing goods—access to a full range of health care services and religious liberty. Rather than forcing religious employers and individuals into taking extreme measures, policymakers may well choose to give them a less extreme option. The Obama administration has a ready vehicle for providing this way-out—the hardship waiver.³⁵⁷

VII. SEVENTH STICKING POINT: EXEMPTIONS WILL UNDERMINE DIGNITY

Many contend that religious liberty exemptions encourage or facilitate discrimination and bigotry and thus will undermine the dignity of same-sex couples.³⁵⁸ As a threshold matter, the possibility of dignitary harm will not take policymakers very far because there are *two* impositions of indignity here—the possible affront to lesbian and gay couples who are turned aside, and the affront to religious believers who are told that their beliefs are not to be tolerated, at least not in the public sphere. As Judy Brown, president of the American Life League, noted:

The Rev. John A. Leies, . . . president emeritus of St. Mary's University, . . . reminds us that Vatican II declared, "In the depths of their conscience, men and women detect a law which they do not impose on themselves but which holds them to obedience, a law written by God; to obey it is the very dignity of men and women. According to it they will be judged." This is what Obama's mandate violates. He will strip us of the dignity that obedience to God's moral law provides.³⁵⁹

³⁵⁷ See *supra* note 341 and accompanying text (discussing the hardship waiver).

³⁵⁸ See *Hearing on D.C.'s Same-Sex Marriage Bill*, *supra* note 40, at 6:57:55 (statement of Councilmember David Catania describing religious exemptions as a "get out of jail free" card authorizing discrimination); see also Wilson, *supra* note 46, at 319 n.3 ("Tolerate intolerance? Not a chance. Bigotry is bigotry, even if they're pretending God told them to do so." (quoting anarcho-liberal-tarian, Comment to Wilson, *Marriage Equality Bill*, *supra* note 246)).

³⁵⁹ Press Release, Judy Brown, President of the Am. Life League, HHS Mandate Strips Catholic Freedom and Human Dignity (Feb. 23, 2012), *available at* <http://www.all.org/article/index/id/MTAwMTk>. The controversy over the New York town clerk's "creative solution" to her religious objection to same-sex marriage illustrates the competing claims of intolerance and harm. One of the women seeking the marriage license in New York told the *New York Times* that "[g]ay people have fought so long and hard to get these civil rights To have her basically telling us to get in the back of the line is just not acceptable." See Kaplan, *supra* note 221. The clerk countered in the *Wall Street Journal*, stating that "people are opposed to accommodating [my] faith." *Gay Marriage, Religion Issues in NY Clerk Race*,

Legislators face dueling dignitary harms, and thus dignitary considerations cannot by themselves resolve the question of whether to have exemptions. They can, however, help us structure exemptions—at least some of the time.

In a perfect world, no one would ever know that a religious objector stepped aside. How would this work? Consider a government marriage license office with four clerks: Faith, Hope, Charity, and Efficiency. Only Faith objects to assisting with same-sex marriage license applications. If all four clerks randomly greet individuals and couples who present, disaster looms. Faith could easily pop up to assist a young man, Steve, only to find him later joined with his same-sex partner. If Faith refuses to assist the couple, surely they will notice and be offended.

Contrast this with a Division of Motor Vehicles-style intake scheme in which one clerk does the intake and farms out work to the others. In this scheme, Efficiency might serve in the intake role, or she, Hope, and Charity might switch off, leaving Faith to spend her day processing paperwork without greeting the public. When Steve arrives, Efficiency quickly and efficiently directs him and his partner to a willing provider. Faith does not receive a pass; she still has the duty to serve other couples.

But note what does not happen in this system: same-sex couples are not asked to step into another line. They are not asked to wait longer. And they never even know that they have been queued to a non-objecting clerk. Obviously, any dignitary harm evaporates if the exemption is invisible.

How an office chooses to staff around an objector would be within its sound discretion, absent some other provision of state law,³⁶⁰ since the best arrangement may change with the specific circumstances facing the office—such as the number of willing providers, the number of religious objectors, the volume of requests for marriage applications in relation to other work, and so forth.

Some voice a nagging “suspicion that, for some of these people—not all, but some—what’s cast as a ‘principled religious objection’ boils down to simple gut feeling.”³⁶¹ The possibility of unfair surprise is a serious one and warrants attention. Willy-nilly refusals can be avoided by

WALL. ST. J. (Oct. 25, 2011), http://sec.online.wsj.com/article/APdc4e266cbfc34cfc97b08b5a3e786654.html?mod=WSJ_NY_LEFTAPHeadlines. This trope is gaining a lot of traction. See Goodstein, *supra* note 100.

³⁶⁰ See *supra* note 227 (discussing a New York law allowing the delegation of tasks to other personnel).

³⁶¹ See Corvino, *supra* note 165.

making objectors state their objections in advance and in writing—a common device used to implement health care conscience clauses and conscientious objection to military service.³⁶² Checking in with employees about possible objections is crucial in order to enable employers to staff around those who object and avoid unfair surprise to both the public and the employer.

Four concrete commitments would limit the possibility of dignitary harm to same-sex couples and should guide the staffing arrangement:

- (1) Same-sex couples should never have to stand in another line;
- (2) Same-sex couples should receive the service in the same manner that any other couple receives it (so that if heterosexual couples receive a service by appointment or mail-in request, same-sex couples would, too);
- (3) Any scheme to staff around an objector should be invisible to same-sex couples; and
- (4) If an employee gave no advance statement of a religious objection, no refusal should be allowed.

The controversy in New York over the town clerk's delegation of marriage license applications to an assistant is again instructive. If New York laws indeed permitted such a delegation,³⁶³ there was no compelling reason for the clerk to articulate the reason behind this staffing change. The clerk's public explanations created a lot of needless rancor.³⁶⁴

Obviously, these commitments make sense for a government office or for a large bureaucratic organization in the private sector. They would not, however, shield same-sex couples from the insult of being denied services from small "Mom and Pop" businesses in the wedding industry. Nonetheless, as noted above, same-sex couples have considerable recourse in the marketplace for such refusals.³⁶⁵ In short, we should strive to make accommodations as cost-free as possible when we

³⁶² Legislators can, and should, authorize employers to ask about potential objections or demand that potential objectors state their objections *ex ante* in writing. See Wilson, *supra* note 30, at 299–327 (excerpting selected state statutes permitting an objection only if the invoker shows proof or states his or her reasons in writing).

³⁶³ See *supra* note 227.

³⁶⁴ See, e.g., Dial, *supra* note 283.

³⁶⁵ See *supra* notes 118, 285–286 and accompanying text (discussing the backlash against a New Jersey bridal shop that refused to serve a lesbian customer).

can do so, but the fact that we cannot achieve that end in each and every case does not negate the good that we can do.

CONCLUSION

This Article considers a burning issue in society today—whether, and under what circumstances, religious groups and individuals should be exempted from the dictates of civil law. A number of the “sticking points” to providing religious liberty exemptions to same-sex marriage laws collected in this Article bear an uncanny resemblance to those raging in the debate over the Obama administration’s sterilization and contraceptive coverage mandate. Among these real-world points of resistance to providing religious accommodations are legitimate, troubling concerns in a pluralistic, democratic society: why should legislators accommodate anyone’s beliefs; how can we distinguish between legitimate religious beliefs and animus or mere silliness; how attenuated can one’s participation in an objectionable activity be and still warrant protection, among other issues. As this Article demonstrates, access and religious liberty need not be mutually exclusive social goods if policymakers embrace nuanced religious liberty accommodations qualified by hardship to the public. Indeed, qualified exemptions can transform a zero-sum proposition into one in which both access and religious freedom can be affirmed.

Ultimately, religious objectors must make convincing claims for legislative accommodations because they are not shielded from generally applicable, neutral laws as a matter of federal constitutional right. In the end, no matter how thoughtful an exemption or a claim for exemptions may be, realistically to obtain religious liberty protection requires that proponents understand how exemptions look to decision-makers on the ground.

APPENDIX A: CORE RELIGIOUS LIBERTY PROTECTIONS IN SAME-SEX MARRIAGE LEGISLATION

All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) expressly exempt clergy from requirements to solemnize or celebrate marriages inconsistent with their religious faith.

See CONN. GEN. STAT. § 46b-35a (West Supp. 2011); D.C. CODE § 46-406(c) (LexisNexis Supp. 2011); N.H. REV. STAT. ANN. § 457:37 (Supp. 2011); N.Y. DOM. REL. LAW § 11(1)(1-a) (McKinney Supp. 2012); VT. STAT. ANN. tit. 18, § 5144(b) (Supp. 2011); WASH. REV. CODE ANN. § 26.04.010(2)(4) (West 2005); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012).

All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) expressly allow a religiously-affiliated group to refuse to provide services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage.

See CONN. GEN. STAT. § 46b-35a; D.C. CODE § 46-406(e); N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1) (McKinney Supp. 2012); VT. STAT. ANN. tit. 9, § 4502(l) (Supp. 2011); WASH. REV. CODE ANN. § 26.04.010(2)(5); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012).

All jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, Vermont, and Washington) expressly protect covered religious objectors from private suit.

See CONN. GEN. STAT. § 46b-35a; D.C. CODE § 46-406(e); N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); VT. STAT. ANN. tit. 9, § 4502(l); WASH. REV. CODE § 26.04.010(2)(6); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012).

Six jurisdictions (Connecticut, the District of Columbia, Maryland, New Hampshire, New York, and Washington) expressly protect religious objectors, including religiously affiliated nonprofit organizations, from being penalized by the government for such refusals through, for example, the loss of governments grants.

See CONN. GEN. STAT. § 46b-35a; D.C. CODE § 46-406(e)(2); N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-

b(1); WASH. REV. CODE § 26.04.010(2)(4); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012).

Three jurisdictions (the District of Columbia, Maryland, and New Hampshire) expressly protect religious organizations from promoting same-sex marriage in violation of the religious society's beliefs through religious programs, counseling, courses, or retreats.

See D.C. CODE § 46-406(e); N.H. REV. STAT. ANN. § 457:37(III) (exempting “the promotion of marriage through religious counseling, programs, courses, retreats, or housing designated for married individuals”); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012) (provided so long as the program receives no government funding). New York may provide this protection as well. *See* N.Y. DOM. REL. LAW § 10-b(2) (“[N]othing in this article shall limit or diminish the right . . . of any religious . . . organization . . . from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained.”).

Two jurisdictions (New Hampshire and New York) expressly protect religious organizations from promoting marriage through . . . housing designated for married individuals.

See N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(2) (“[N]othing in this article shall limit or diminish the right . . . of any religious . . . organization . . . to limit employment or sales or rental of housing accommodations or admission to or give preference to persons of the same religion or denomination.”).

Three states (Maryland, New Hampshire, and Vermont) expressly allow religiously-affiliated fraternal organizations, such as the Knights of Columbus, to limit insurance coverage to spouses in traditional marriages.

See N.H. REV. STAT. ANN. § 457:37(IV); VT. STAT. ANN. tit. 8, § 4501(b) (Supp. 2011); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012).

Two states (Connecticut and Maryland) expressly allow a religiously-affiliated adoption or foster care agency to place children only with heterosexual married couples so long as they don't receive any government funding.

See CONN. GEN. STAT. § 46b-135b; H.B. 438, 2012 Leg., 430th Sess. (Md. 2012).

Three states (Maryland, New Hampshire and New York) expressly exempt individual employees who are managed, directed, or supervised by or in conjunction with a covered entity from celebrating same-sex marriages if doing so would violate their religious beliefs.

See N.H. REV. STAT. ANN. § 457:37(III); N.Y. DOM. REL. LAW § 10-b(1); H.B. 438, 2012 Leg., 430th Sess. (Md. 2012).

Two states (Maryland and New York) include non-severability clauses in their legislation.

See 2011 N.Y. Laws 752; H.B. 438, 2012 Leg., 430th Sess. (Md. 2012).

APPENDIX B: PROPOSED SAME-SEX MARRIAGE LEGISLATION

The Marriage Conscience Protection Act that I and others have proposed³⁶⁶ would read:

Section ____**(a) Religious organizations protected.**

No religious or denominational organization, no organization operated for charitable or educational purposes which is supervised or controlled by or in connection with a religious organization, and no individual employed by any of the foregoing organizations, while acting in the scope of that employment, shall be required to

- (1) provide services, accommodations, advantages, facilities, goods, or privileges for a purpose related to the solemnization or celebration of any marriage; or
- (2) solemnize any marriage; or
- (3) treat as valid any marriage

if such providing, solemnizing, or treating as valid would cause such organizations or individuals to violate their sincerely held religious beliefs.

(b) Individuals and small businesses protected.

(1) Except as provided in paragraph (b)(2), no individual, sole proprietor, or small business shall be required to

- (A) provide goods or services that assist or promote the solemnization or celebration of any marriage, or provide counseling or other services that directly facilitate the perpetuation of any marriage; or
- (B) provide benefits to any spouse of an employee; or
- (C) provide housing to any married couple

if providing such goods, services, benefits, or housing would cause such individuals or sole proprietors, or owners of such small businesses, to violate their sincerely held religious beliefs.

(2) Paragraph (b)(1) shall not apply if

³⁶⁶ This proposal has previously appeared in Wilson, *supra* note 46, at 367–68.

(A) a party to the marriage is unable to obtain any similar good or services, employment benefits, or housing elsewhere without substantial hardship; or

(B) in the case of an individual who is a government employee or official, if another government employee or official is not promptly available and willing to provide the requested government service without inconvenience or delay; *provided that* no judicial officer authorized to solemnize marriages shall be required to solemnize any marriage if to do so would violate the judicial officer's sincerely held religious beliefs.

(3) A "small business" within the meaning of paragraph (b)(1) is a legal entity other than a natural person

(A) that provides services which are primarily performed by an owner of the business; or

(B) that has five or fewer employees; or

(C) in the case of a legal entity that offers housing for rent, that owns five or fewer units of housing.

(c) No civil cause of action or other penalties.

No refusal to provide services, accommodations, advantages, facilities, goods, or privileges protected by this section shall

(1) result in a civil claim or cause of action challenging such refusal; or

(2) result in any action by the State or any of its subdivisions to penalize or withhold benefits from any protected entity or individual, under any laws of this State or its subdivisions, including but not limited to laws regarding employment discrimination, housing, public accommodations, educational institutions, licensing, government contracts or grants, or tax-exempt status.

